Supreme Court, U.S.
FILED

931323 FEB 16 1994

OFFICE OF THE CLERK

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KELLY E. DENOOYER, BY NEXT FRIEND
ILENE DENOOYER; ILENE DENOOYER,
Petitioners,

v.

LIVONIA PUBLIC SCHOOLS, CAROLE SAMPLES,
DR. KENT GAGE, JANE VAN POPERIN,
JOSEPH MERINELLI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

David R. Melton
0-932 Chicago Drive
Jenison, MI 49428
(616) 457-4700

Robert A Lusk
440 East Congress
5th Floor
Detroit, MI 48226
(313) 965-7610

February 16, 1994

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

62 P

QUESTIONS PRESENTED

1. WHETHER, IN A PUBLIC SCHOOL FREE SPEECH CASE, THERE IS A DISTINCTION BETWEEN THE LEGAL STANDARDS TO BE APPLIED TO "USE" CASES AND "ACCESS" CASES.

2. WHETHER, WHEN A PUBLIC SCHOOL CREATES A "LIMITED PUBLIC FORUM" WITHIN THE CONTEXT OF CURRICULUM-RELATED STUDENT SPEECH, THE "NO CONTENT-BASED DISCRIMINATION" STANDARD OR THE "LEGITIMATE PEDAGOGICAL INTEREST" STANDARD APPLIES.

3. WHETHER SCHOOL OFFICIALS CAN ENGAGE IN VIEWPOINT DISCRIMINATORY CENSORSHIP OF CURRICULUM-RELATED STUDENT SPEECH WITHOUT VIOLATING THE FREE SPEECH CLAUSE.

4. WHETHER RELIGION IS A SUSPECT CLASSIFICATION REQUIRING A "STRICT SCRUTINY" ANALYSIS AND A "COMPELLING GOVERNMENTAL INTEREST" FINDING.

LIST OF PARTIES

The parties to the United States District Court for the Eastern District of Michigan case and the United States Court of Appeals for the Sixth Circuit proceedings were the Petitioners, Kelly E. DeNooyer, by next friend Ilene DeNooyer, and Ilene DeNooyer, and Respondents Livonia Public Schools, Carole Samples, individually and in her official capacity as Assistant Superintendent for Instruction; Dr. Kent Gage, individually and in his official capacity as Director of Elementary Education; Jane Van Poperin, individually and in her official capacity as principal of McKinley Elementary School, and Joseph Merinelli, individually and in his official capacity as Superintendent of the Livonia Public Schools.

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
I. WHERE THE FREE SPEECH RIGHTS OF AN INSIDER IN A PUBLIC SCHOOL SETTING ARE AT ISSUE, THE PROPER LEGAL STANDARD TO BE APPLIED IS THE "USE" STANDARD AND NOT THE "ACCESS" STANDARD.	5
II. WHEN A PUBLIC SCHOOL CREATES A "LIMITED PUBLIC FORUM" WITHIN THE CONTEXT OF CURRICULUM-RELATED STUDENT SPEECH, THEY MUST APPLY THE "NO CONTENT-BASED DISCRIMINATION" STANDARD TO THAT SPEECH.	7
III. EVEN IF A PUBLIC SCHOOL IS HELD TO BE A "CLOSED PUBLIC FORUM," CURRICULUM-RELATED STUDENT SPEECH RESTRICTIONS MAY NOT BE BASED UPON VIEWPOINT DISCRIMINATORY CONSIDERATION.	9

IV. RELIGION IS A SUSPECT CLASSIFICATION UNDER THE LAW REQUIRING A "STRICT SCRUTINY" ANALYSIS AND A "COMPELLING GOVERNMENTAL INTEREST" FOR RESTRICTION. 11

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	PAGES
Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569, 573 (1990)	5
Bell v. Little Axe Independent School Dist. No. 70, 766 F.2d 1391, (10th Cir. 1985)	8
Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986)	8
Bishop v. Aronov, 926 F.2d 1066, (11th Cir. 1991), *cert. denied sub nom.*	8
Bishop v. Delchamps, ___ U.S. ___, 112 S.Ct. 3026, •120 L.Ed.2d 897 (1992)	8
Braunfeld v. Brown, 366 U.S. 599, 607 (1961)	12
Burch v. Barker, 861 F.2d 1149, (9th Cir. 1988)	6
Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, (1985)	10, 11
DeNooyer by DeNooyer v. Livonia Public Schools, 799 F. Supp. 744, (E.D.Mich. 1992)	4, 7, 8
Duran v. Nitsche, 780 F.Supp. 1048, (E.D.Pa. 1991), *appeal dismissed and vacated*, 972 F.2d 1331 (3d Cir. 1992)	8
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)	4, 9, 10
Hedges v. Wauconda Community Unit School District No. 118, No. 92-3779 (7th Cir. 1993)	11
Lamb's Chapel v. Center Moriches School Dist., ___ U.S. ___; 113 S.Ct. 2141 (1993)	10

Lee v. International Society for Krishna Consciousness, Inc., ___ U.S. ___; 112 S.Ct. 2709 (1992) 11

Loving v. Virginia, 388 U.S. 1, 11 (1967) 12

McDaniel v. Paty, 435 U.S. 618, (1978) 11

Miles v. Denver Public Schools, 9444 F.2d 773, (10th Cir. 1991) 8

Nelson v. Moline Sch. Dist., 725 F.Supp. 965, (C.D.Ill. 1989) 8

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 5,7,9,10

Rivera v. East Otero School Dist., 721 F.Supp. 1189, (D.Colo. 1989) 6

School District of Abington Township v. Schempp, 374 U.S. at 225, 513, 586-587 (1968) 14

Shanley v. Northeast Independent School District, 462 F.2d 960, 969 (5th Cir. 1972) 6

Slotterback v. Interboro School Dist., 766 F.Supp. 280, 290 & n. 10 (E.D.Pa. 1991) 6, 8

Texas State Teachers Association v. Garland Independent School District, 777 F.2d 1046, 1953 (5th Cir. 1985) *aff'd mem.*, 479 U.S. 801 (1986) 6

Thompson v. Waynesboro Area School Dist., 673 F.Supp. 1379, (M.D.Pa. 1991) 8

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 4, 6, 10

Torcaso v. Watkins, 376 U.S. at 495, n. 11. (1965) 14

United States v. Carolene Products Co., 304 U.S. 144 (1938) 12

Widmar v. Vincent, 454 U.S. 263, (1981) 9,11

Zobel v. Williams, 457 U.S. 55, (1982) 13

STATUTES AND CONSTITUTIONAL PROVISIONS

28 U.S.C. § 1254(1) . . . . . v, 2

42 U.S.C. § 1983 . . . . . vi, 2

Fed.R.Civ.P. 56(c) . . . . . vii, 4

United States Constitution, Amendment I . . . . . vi, 2

United States Constitution, Amendment XIV . . . vi, 2

OTHER AUTHORITIES

Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw UL Rev 1, 48 (1986) 6

Religious Liberty, Nonestablishment and Doctrinal Development Part II, 81 *Harv. L. Rev.* 513 . . 14

No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KELLY E. DENOOYER, BY NEXT FRIEND
ILENE DENOOYER; ILENE DENOOYER,
Petitioners,

v.

LIVONIA PUBLIC SCHOOLS, CAROLE SAMPLES,
DR. KENT GAGE, JANE VAN POPERIN,
JOSEPH MERINELLI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on November 18, 1993.

OPINIONS BELOW

The United States District Court for the Eastern District of Michigan's Opinion and order of July 30, 1992, appears at 799 F.Supp. 744 (E.D. MI 1992). It appears in the appendix at ___. The opinions and orders of the United States Court of Appeals for the Sixth Circuit dated August 3, 1993, and November 18, 1993, are not recommended for full text publication under 6th

Cir. R. 24 and are therefore unreported. The August 3, 1993, opinion and order appears in the appendix at ___. The November 18, 1993, opinion and order appears in the appendix at ___.

JURISDICTION

This case seeks review of a decision of the United States Court of Appeals for the Sixth Circuit entered on November 18, 1993. This is a civil case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any status, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunitatis secured by the Constitution and laws, shall be liable to the party injured in an action at law, suite in equity, or other proper proceedings for redress.

STATEMENT OF THE CASE

In 1990 Kelly DeNooyer was a second grader at McKinley Elementary School. Respondent teacher, Sandra Solomon, created a program called "V.I.P. of the Week" in which one child a week was selected to "wear a V.I.P. badge [and] be able to bring in 'special' belongings from home." The program was designed "to promote and increase [each] child's self-esteem." Kelly was the second child selected as "V.I.P. of the Week." On December 14, 1990, as part of her presentation for that day, Kelly brought in a videotape of her singing a song at church.

Kelly chose the videotape "[b]ecause it was the first time I ever sang in the auditorium where all the people were, and I was very excited." Respondent Solomon reviewed the videotape during recess and refused to allow Kelly to show it because it had either "Christian things in it" or "religious things in it."

Kelly stated that the incident made her feel embarrassed and picked on. Petitioners indicate that they feel that the school disapproves of their religion and has created an atmosphere of social compulsion or ostracism. This perception of hostility towards Kelly's religion is reinforced by the fact that a Jewish classmate was permitted to bring in a menorah, both as a part of the "V.I.P. of the Week" program and for "show and tell."

Kelly's mother, Ilene DeNooyer, attempted to determine the basis for the censorship by following the "chain of command" in the school. While the school officials one year later tendered "legitimate pedagogical reasons" for the censorship, during Ilene's inquiries none of these concerns were ever discussed. The inquiries revealed one cause for the censorship — the religious viewpoint or content of the tape.

On June 14, 1991, Kelly and her mother brought suit against the Livonia Public Schools and certain school officials. The Complaint alleged violation of their Constitutional rights to freedom of speech, free exercise of religion, equal protection,

freedom of association, and the liberty interest of a parent to educate her child.

The District Court denied the DeNooyer's motion for summary judgment and granted the school district's motion for summary judgment under Fed.R.Civ.P. 56(c). The court concluded that the Livonia Public Schools are "closed public fora." *DeNooyer by DeNooyer v. Livonia Public Schools*, 799 F. Supp. 744, 749 (E.D.Mich. 1992). The District Court further found that "[b]ecasue Kelly asserts a right to speech in a closed forum, the school authorities may regulate the content of her speech in any reasonable manner." *Id.* at 749. The court declined to decide the establishment clause issue noting that "the Court need only find that concern about the impact of the religious message of the tape on a second grade audience, presented during class time, was a legitimate pedagogical concern." *Id.* at 751.

The District Court determined that the instant case was a "use" case and concluded that both *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) were also "use" cases, holding that the "use" and "access" distinction was flawed because" [t]he original commentator did not have *Hazelwood* available to him when he suggested the use/access distinction, and the Supreme Court's analysis in *Hazelwood* defies this categorization. "*Id.* at 752.

As regards the Free Exercise claim, the court noted that "[p]laintiffs have not brought forth any evidence that the school's decision... substantially burdened any central religious belief or practice." *Id.* at 753. The Court held that there was no sustainable equal protection claim, because the school authorities "had a rational basis for distinguishing between Kelly DeNooyer's videotape and [the Jewish student]'s speech." *Id.* at 754. Lastly, the District Court concluded that the free association and liberty interest claims should be dismissed. *Id.* at 754-55.

The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court on August 3, 1993. A petition for rehearing and a suggestion for rehearing in banc were denied by the Court of Appeals. On November 18, 1993, the Court of Appeals substituted an opinion for that previously filed on August 3, 1993, finding that "[b]ecause the school had not opened the classroom for use as a public forum, it could regulate both the style and the content of Kelly DeNooyer's presentation, provided its regulation was reasonably related to legitimate pedagogical concerns of the school." Appendix, p. ___. The court of appeals concluded that "[t]hese pedagogical concerns apply to the "style" of the presentation, that is, the medium of the videotape itself, regardless of its contents. This concern as to the medium of videotape being sufficient to affirm the district court, it is unnecessary to rule on the other reasons presented by the defendants." *Id.* at ___.

REASONS FOR GRANTING THE WRIT

I. WHERE THE FREE SPEECH RIGHTS OF AN INSIDER IN A PUBLIC SCHOOL SETTING ARE AT ISSUE, THE PROPER LEGAL STANDARD TO BE APPLIED IS THE "USE" STANDARD AND NOT THE "ACCESS" STANDARD.

The District Court and the parties involved in the present case all agree that this case is a "use" case, rather than an "access" case, yet both the District Court and the Court of Appeals employed the "access" forum analysis in *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983) instead of the "use" test applied in *Tinker*.

In *Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1990), this Court noted:

> at least one commentator contends that *Perry* does not control a case such as this in which the respondents already have access to the airport, and therefore con-

> cludes that this case is analogous to *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969). See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw UL Rev 1, 48 (1986). Because we conclude that the resolution is facially unconstitutional under the First Amendment overbreadth doctrine regardless of the proper standard, we need not decide whether LAX is indeed a public forum, or whether the *Perry* standard is applicable. when access to a nonpublic forum is not restricted.

See also Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw UL Rev 1, 48 (1986)("public forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak."); *Burch v. Barker*, 861 F.2d 1149, 1158-59 (9th Cir. 1988); *Slotterback v. Interboro School Dist.*, 766 F.Supp. 280, 290 & n. 10 (E.D.Pa. 1991); *Rivera v. East Otero School Dist.*, 721 F.Supp. 1189, 1193 (D.Colo. 1989).

There is a valid distinction between the free speech rights regarding communications between students and teachers and the rights of "persons not assigned to the schools". *Texas State Teachers Association v. Garland Independent School District*, 777 F.2d 1046, 1953 (5th Cir. 1985) *aff'd mem.*, 479 U.S. 801 *aff'd* (1986). "Outsiders" are evaluated by forum analysis under the standards of *Perry*. "Insiders" are evaluated under the standards of *Tinker*. The *Tinker* test permits the suppression of communication only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school." *Id.*; *Shanley v. Northeast Independent School District*, 462 F.2d 960, 969 (5th Cir. 1972). In the present case, the District Court and the Court of Appeals both used the *Perry* standard when the *Tinker* standard was

appropriate, and we therefore respectfully request clarification from this Court on the proper legal standard to be applied in insider speech cases.

II. WHEN A PUBLIC SCHOOL CREATES A "LIMITED PUBLIC FORUM" WITHIN THE CONTEXT OF CURRICULUM-RELATED STUDENT SPEECH, THEY MUST APPLY THE "NO CONTENT-BASED DISCRIMINATION" STANDARD TO THAT SPEECH.

If forum analysis is the proper legal standard to be applied in the present case we would ask this Court to consider that neither the District Court nor the Court of Appeals in *DeNooyer* ever discussed the central point made by the Petitioners — Whether a school can restrict curriculum related speech in a limited or designated public forum based upon content discriminatory considerations. McKinley Elementary School created a limited public forum for their students by the terms of their V.I.P. Program. Further, the school allowed a menorah, which is an important symbol of the Jewish faith, to be discussed by a fellow student of Kelly's, and thereby waived any legitimate pedagogical interest it might arguably have in connection with the discussion of any religious material whatsoever.

This Court has defined a "designated public forum" as "public property which the State has opened for use by the public as a place for expressive activity." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). In *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 45 and 46, n. 7.), this Court explained that "a public forum may be created by government designation of a place or channel of communications for use by certain speakers, or for the discussion of certain subjects."

The legal standards applied by the District Court and the Court of Appeals were based on a line of cases which have erroneously interpreted the law regarding classroom activities.

The District Court found that "the undisputed facts" established that the classrooms were never opened for "unregulated public speech", and that the school did not "open its doors for indiscriminate public expression." *DeNooyer by DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744, 749 (E.D.Mich. 1992). Thus, the District Court based its judgment on two misinterpretations regarding "limited public fora": 1) public fora can only exist if they are created for indiscriminate use (i.e., no limitations on subject matter); and 2) public fora can only exist if they are used by the general public, and that all curriculum related speech therefore occurs in a "nonpublic forum."

In the present case, the District Court erroneously looked to the law of other Circuits for the determination of a question of fact. See *DeNooyer by DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D.Mich. 1992)(citing *Miles v. Denver Public Schools*, 9444 F.2d 773, 776 (10th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991), cert. denied sub nom. *Bishop v. Delchamps*, ___ U.S. ___, 112 S.Ct. 3026, 120 L.Ed.2d 897 (1992); *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1401 (10th Cir. 1985); and *Duran v. Nitsche*, 780 F.Supp. 1048, 1053-54 (E.D.Pa. 1991), *appeal dismissed and vacated*, 972 F.2d 1331 (3d Cir. 1992)). The District Court did not discuss the numerous cases which have held public schools to be limited public fora. See *Bender v. Williamsport Area School District*, 741 F.2d 538, 549 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Bell v. Little Axe Independent School Dist.*, 766 F.2d 1391, 1402 (10th Cir. 1985); *Slotterback v. Interboro School Dist.*, 766 F.Supp. 280, 293 (E.D.Pa. 1991); *Thompson v. Waynesboro Area School Dist.*, 673 F.Supp. 1379, 1385-87 (M.D.Pa. 1991); *Nelson v. Moline Sch. Dist.*, 725 F.Supp. 965, 971-974 (C.D.Ill. 1989).

In "limited public fora," a state is bound by the "same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest." *Perry*, 460 U.S. at 46 (citing *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981). This test stands in sharp contrast to Dr. Gage's correspondence stating that "[w]hether or not . . . essays or book reports [with religious themes] were read to the entire class *would depend on that content* since whole class participation might well place the teacher in the inappropriate role of disseminating religious doctrine." (emphasis added). Similarly, it sharply contrasts with teacher Solomon telling Kelly she would not be permitted to show the videotape because the tape had either "Christian things in it" or "religious things in it." The school's counsel was quite candid on appeal: "[R]eligion, along with the aforementioned numerous other reasons, were the grounds for not showing Kelly's videotape." *Appellees' Brief on Appeal*, p. 16, n. 5. As the school apparently had no objection to the presentation and explanation of a different religion's symbols (i.e. a menorah) counsel for the school and the school authorities appear to have mistaken a hostility toward a particular religion as a "legitimate pedagogical interest" in the upholding of the "separation of church and state."

III. EVEN IF A PUBLIC SCHOOL IS HELD TO BE A "CLOSED PUBLIC FORUM," CURRICULUM-RELATED STUDENT SPEECH RESTRICTIONS MAY NOT BE BASED UPON VIEWPOINT DISCRIMINATORY CONSIDERATION.

The Court of Appeals' decision provides an opportunity for this Court to rule definitively on an important and still unanswered question. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), was found by the District Court and the Court of Appeals to be dispositive in this case. Both courts mistakenly interpreted *Hazelwood* to create an in-class-

room/out-of-classroom distinction when, in reality, it merely created a distinction between *toleration* and *affirmative promotion* of students' speech. See *Hazelwood*, 484 U.S. at 270-71. *Tinker*, by its explicit terms, found that "[a]ny word spoken, *in class*, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . ." *Tinker*, 393 U.S. at 508-509 (emphasis added). This finding in *Tinker* is relevant to the present case because the District Court itself raised the rationale behind the decision.

A question left unanswered in *Hazelwood* is whether the "no viewpoint discrimination" prong of the *Perry* forum analysis is applicable in a curriculum related case. *Hazelwood* itself indicates that "it is this [*Perry*] standard, rather than our decision in *Tinker*, that governs this case." *Id.* at 271.

Because the Court of Appeals in the present case did not consider that *Hazelwood* incorporated a "no viewpoint discrimination" prong it erroneously decided a federal question in a way that conflicts with applicable decisions of this Court. In the present case, this issue is particularly important in light of this Court's ruling in *Lamb's Chapel v. Center Moriches School Dist.*, ___ U.S. ___; 113 S.Ct. 2141 (1993). Here, as in *Lamb's Chapel*, a "close question" exists as to whether the district created a designated public forum. Similarly, here, as in *Lamb's Chapel*, it is not necessary to rule on this issue because even if the courts below were correct in this respect the judgment of the lower courts must be reversed.

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, *Lamb's Chapel* held that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 2147 (citing *Cornelius v. NAACP Legal Defense & Ed.*

Fund, 473 U.S. 788, 806 (1985) and *Perry*, 460 U.S. at 49) (emphasis added).

While the school has tendered numerous grounds for the censorship, "[t]he existence of reasonable grounds for limiting access to a nonpublic forum . . . will not save a regulation that is in reality a facade for viewpoint-based discrimination." *Cornelius*, 473 U.S. at 811. The preference for one religion or philosophy over another must surely be considered viewpoint-based discrimination.

"The First Amendment's ban on discriminating against religious speech does not depend on whether the school is a "public forum" and, if so, what kind . . ." *Hedges v. Wauconda Community Unit School District No. 118*, No. 92-3779 (7th Cir. 1993), slip op. at p. 5. Even if one concludes that a public school is a "nonpublic forum," this merely means that the school need not open its doors to private speakers, but, like the airport in *Lee v. International Society for Krishna Consciousness, Inc.*, ___ U.S. ___; 112 S.Ct. 2709 (1992), it may not adopt unjustified restrictions and may not discriminate against disfavored viewpoints or subjects (such as religion). *Id.*, slip op. at p. 11.

IV. RELIGION IS A SUSPECT CLASSIFICATION UNDER THE LAW REQUIRING A "STRICT SCRUTINY" ANALYSIS AND A "COMPELLING GOVERNMENTAL INTEREST" FOR RESTRICTION.

This case presents issues of paramount public importance. As Justice Brennan noted in a concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978);

> [The] Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

As was noted in *Widmar, supra* 454 U.S. at 273 n. 13:

> This case is different from cases in which religious groups claim that the denial of facilities not available to other groups deprives them of the rights under the Free Exercise Clause. Here, the University's forum already available to other groups, and respondents' claim to use that forum does not rest solely on rights claimed under the Free Exercise Clause. . .

The school forum open to discussion of other belief and value systems at McKinley was denied Kelly DeNooyer.

While discrimination between religions has been discussed previously, it is important to note that "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be. . . indirect." *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (plurality opinion).

The policy of the school that seeks to judge the merits of religious belief systems and exclude speech on the basis of religion is violative of precious, two-hundred-year-old freedoms granted by the Constitution's First Amendment Free Speech and Religion clauses, as reinforced by the Fourteenth Amendment Equal Protection Clause.

When fundamental and personal rights are at stake, the Supreme Court has subjected state classification of persons and objects to strict scrutiny. In the early case of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), this Court recognized that restraints on free speech,interference with political organizations, freedom of assembly and discrimination against religious, national or racial minorities, require a "more searching judicial inquiry" under the Equal Protection Clause. Since that time, the Court has identified certain classifications as "suspect" and others involving "fundamental rights," both of which are subject to "strict scrutiny" by the Court and require a showing that there is a compelling state interest "necessary to the accom-

plishment of some permissible state objective." *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Classification in the area of race, religion and nationality are suspect because they affect discrete and insular minorities.

Equal protection principles apply in the context of a public forum case, where persons are denied important public benefits granted to others without restriction. In *Zobel v. Williams*, 457 U.S. 55, 60 (1982), this Court recognized that "when a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." The discrimination here is based on the traditional "suspect" class of religion, the distinction is subject to strict scrutiny and the state must demonstrate a compelling state interest for the distinctions that have been drawn between beneficiaries.

CONCLUSION

The virulent hostility which the Defendants-Appellees have towards religion and religious persons is self evident in their Appellee's Brief on Appeal. Such virulence amounts to a *de facto* establishment of what the Supreme Court has previously identified as a "religion of secularism," *School District of Abington Township v. Schempp*, 374 U.S. at 225, which seeks to eradicate all mention of religion from public life. See also Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development — Part II*, 81 *Harv. L. Rev.* 513, 586-587 (1968) and *Torcaso v. Watkins*, 376 U.S. at 495, n. 11.

Accordingly, the Plaintiffs-Appellants request that this Court reverse the decision of the District Court for the Eastern District of Michigan and find that Kelly DeNooyer's constitutional rights were violated.

Respectfully submitted,

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
THE RUTHERFORD INSTITUTE
1445 East Rio Road
Charlottesville, VA 22901
(804) 978-3888

A1

Kelly E. DeNOOYER, by Next Friend Ilene DeNOOYER and Ilene DeNOOYER,

Plaintiffs,

v.

LIVONIA PUBLIC SCHOOLS, *et al.*,

Defendants.

No. 91-72963

United States District Court
E.D. Michigan, S.D.

July 30, 1992

Second grade student and her mother brought action against public schools and administrative personnel under § 1983 alleging violation of constitutional rights when school authorities prohibited student from showing videotape of herself singing proselytizing religious song to second grade class during show and tell. Schools and administrative personnel moved for summary judgment. The District Court, Edmunds, J., held that (1) school district's restriction on second grader's speech was reasonable and did not violate First Amendment, and (2) there was no violation of equal protection clause when another student was permitted to discuss menorah at show and tell.

Motion granted.

1. Constitutional Law 84.5(3), 90.1(1.4)

Students do not shed their constitutional rights to freedom of speech or expression at schoolhouse gate. U.S.C.A. Const.Amend. 1.

2. Constitutional Law 90.1(1.4)

Where student initiated speech occurs as part of curriculum in closed forum of classroom, school authorities may limit speech as long as their actions are reasonably related to legitimate pedagogical concerns. U.S.C.A. Const.Amend. 1.

3. Constitutional Law 90.1(4)

"Traditional public forums," for purposes of First Amendment, include areas such as streets and parks that time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

4. Constitutional Law 90.1(4)

"Limited public forums," for purposes of First Amendment, are those created by state when it opens its property for expressive activity. U.S.C.A. Const.Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law 90.1(4)

Government may only restrict speech in public forums or limited public forums if restriction is necessary to serve compelling state interest and is narrowly drawn to achieve that end. U.S.C.A. Const.Amend. 1.

6. Constitutional Law 90.1(4)

If state facilities have not been dedicated to public use but have instead been reserved for other purposes, they are closed forums and state may impose reasonable restrictions on speech in those forums under the First Amendment. U.S.C.A. Const.Amend. 1.

7. Constitutional Law 90.1(1.4)

For freedom of speech purposes, schools are not traditionally public forums; however, school officials may create limited public forum if, by policy or practice, they open school for indiscriminate use by public.

8. Constitutional Law 90.1(1.4)
Schools 171

Second-grade classroom was a closed forum during class hours and, accordingly, school authorities could regulate content of students' speech in any reasonable manner: undisputed facts established that public schools did not open classrooms at the elementary school for unregulated public speech. U.S.C.A. Const.Amend. 1.

9. Constitutional Law 84.5(3)
Schools 172

School districts's restriction on second grader's speech prohibiting her from showing, as part of program designed to develop self-esteem through oral presentations in classroom, a videotape of herself singing a proselytizing religious song was reasonable, regardless of whether permitting speech would violate establishment clause; presentation of videotape would not advance program's objectives and would encourage other students to bring in videos consuming class time, and school wanted to avoid situation where other parents and students would be offended by religious content of speech they were required to listen to or would infer school's endorsement of speech presented during class. U.S.C.A. Const.Amend. 1.

10. Constitutional Law 84.5(3)
Schools 172

School administrators did not violate rights of second grade student under free exercise clause by placing burden on her

ability to freely exercise her religious beliefs by prohibiting her from presenting, as part of program which was designed to develop self-esteem through oral presentations in classroom, videotape of herself singing proselytizing religious song; there was no evidence that preventing student from showing videotape during class substantially burdened any religious belief or practice and school authorities were not required to take action that would advance student's religious beliefs. U.S.C.A. Const.Amend 1.

11. Schools 172

School authorities had rational basis for prohibiting second grade student from playing videotape of herself singing a proselytizing religious song and permitting another student to talk about menorah during presentation regarding Israel; school officials wanted to encourage students to develop their classroom communication skills playing videotape would not have advanced those goals while permitting the other student's speech would and it was not unreasonable for school authorities to conclude that student's proselytizing song might offend other students and their parents while showing of menorah or discussion of its use would be unlikely to cause controversy.

David R. Melton, Grandville, Mich., Alexis I. Crow, Charlottesville, Va., for plaintiffs.

Robert A. Lusk, Christopher M. Murray, Detroit, Mich., for defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EDMUNDS, District Judge.

This matter has come before the Court upon the parties' cross motions for summary judgment. Plaintiffs are Kelly DeNooyer, an elementary student enrolled in Livonia Public Schools, and her mother, Ilene DeNooyer. Plaintiffs brought suit pursuant to 42 U.S.C. § 1983, alleging that Defendants violated their Constitutional rights when Defendants prohibited Kelly DeNooyer from showing a videotape of herself singing a proselytizing religious song to her second grade class during show and tell. Defendants include the Livonia Public Schools and the following administrative personnel: (1) Carole Samples, Assistant Superintendent for Instruction; (2) Dr. Kent Gage, Director of Elementary Education; (3) Jane Van Poperin, Principal of McKinley Elementary School; and (4) Joseph Merinelli, Superintendent. For the reasons stated in this opinion, the Court grants Defendants' motion for summary judgment and denies the summary judgment motion filed by the Plaintiffs.

I. Facts

During the 1990-1991 school year, Kelly DeNooyer was a second grade student at McKinley Elementary School in the Livonia Public School District. Her teacher, Mrs. Sandra Solomon, instituted a V.I.P. program, a type of show and tell in which a different student would be a "V.I.P." each week and would be permitted to bring special belongings to school to present to the class. The V.I.P. program was part of the curriculum for second grade students in Mrs. Solomon's class, designed to promote poise and self esteem through developing oral communications skills in the classroom. Elementary students receive a grade in oral communications. The Principal, Jane Van Poperin, ap-

proved the program which took place during the regular instructional time of the class.

When Kelly DeNooyer was selected to be V.I.P., she brought in a videotape of herself singing before the congregation at Temple Baptist Church where she and her mother are members. Kelly asked to show the tape to the class, and Mrs. Solomon reviewed it pursuant to a school policy which required her to do so. Kelly appeared on the videotape singing "I Came to Love You Early," a proselytizing song.[1]

---

[1] The lyrics to the song are as follows:

Verse 1
I felt sometimes I didn't have a story I could share.
I wasn't rescued from a past destroyed by dark despair.
O but, Jesus, I have memories of the times that we've been through.
And I wouldn't trade one moment of growing up with You.

Refrain
I came to love You early, came to know You young.
You touched my heart, dear Jesus, when my life had just begun.
I gave you my tomorrows and a childish heart of sin,
And You've saved me from a lifetime of what I might have been.

Verse 2
You filled some days with laughter; You held me when I cried.
You said, "Child, you can do anything;"
You helped me when I tried.
No I treasure ev'ry mem'ry, and I'm sure there couldn't be
A child who could have known more love than You have given me.

Verse 3
I remember how You touched me, but I can't explain at all
How a choice that's so important could be made by one so small,
I just put aside my questions; what You said to do, I've done,
And I thank you for the blessings of coming to You young.

(Refrain)

Sue Smith, *I Came to Love You Early* (First Verse Music (ASCAP) 1989).

Mrs. Solomon conferred with Principal Van Poperin, and they agreed that Kelly should not be permitted to show the video. Mrs. Solomon told Kelly that she would not be allowed to show the tape, and informed Ilene DeNooyer of the school's decision. Ilene DeNooyer contacted principal Van Poperin, Kent Gage (the Director of Elementary Education), and Carole Samples (Assistant Superintendent), requesting that Kelly be permitted to show her video. Principal Van Poperin, Dr. Gage, and Superintendent Samples[2] all confirmed the School District's decision not to permit the showing of the video.

The School District gave various reasons for prohibiting the playing of the videotape. Mrs. Solomon indicated that showing a videotape was inconsistent with the purpose of the V.I.P. program, which was designed to develop self esteem through oral presentations in the classroom. Because playing a videotape does not involve speaking before the class, it would not advance the program's objectives. (Affidavit of Sandra Solomon). Further, Mrs. Solomon was concerned that permitting Kelly to show the videotape would encourage other students to bring in videos too. She wanted to avoid the time consuming process of previewing videotapes and using class time to show them; she felt that the time was needed for instruction. The school administrators were also concerned about the message of the song on the videotape, which is about a young child accepting Jesus Christ as her savior.[3] Mrs. Solomon felt that second graders might not have the maturity to understand the context in which the song was presented, that the students might assume

---

[2] Superintendent Joseph Merinelli is also a named defendant in this lawsuit. Although Plaintiffs never brought this matter before him, he was sent copies of correspondence between Plaintiffs and the other named Defendants.

[3] Kelly DeNooyer testified in her deposition that she wanted to share the message of the song with her classmates "[b]ecause I might have a chance to help people get saved." (Kelly DeNooyer 23). However, Kelly's purposes in wanting to show the videotape are not at issue in this lawsuit.

that the School District endorsed the message of the song,[4] and that the song might embarrass or offend other students and their parents. *Id.* In addition, in a letter to Ilene DeNooyer, Dr. Gage stated the policy of the Livonia Public Schools as follows:

> We affirm all children in their own traditions. Freedom of religion is a fundamental right. A separation of church and state mandates no official or unofficial sponsorship of religion and the schools must remain wholly neutral. Thus, a teacher may teach about religion... but shall not act as a disseminating agent for any religious or anti-religious document, book, article, person, agency or the like. It is the responsibility of all faculty members and the administration to see that such activities do not place an atmosphere of social compulsion or ostracism on those who choose to or not to participate in any religious/cultural exercise or activity.

Letter dated January 15, 1991, from Dr. Gage to Mrs. DeNooyer.

---

[4] Defendants contend that if the tape was shown, the students would have inferred that the teacher and the school endorsed the message of the video, and that it would have disrupted the classroom. Defendants submitted the Affidavit of Dr. Thomas Berndt, a professor of child psychology at Purdue University. After reviewing the videotape, Dr. Berndt indicated that in his opinion if Kelly had been permitted to show the video, the other students would have concluded that the song's message was endorsed by the teacher. Dr. Berndt based his conclusion of the "social cues" of the situation—the teacher would have permitted the playing of the video during class time, and any positive comment, whether about the song or Kelly's singing, may have led the students to believe the school endorsed the message. (Affidavit of Dr. Berndt). Dr. Berndt also indicated that the song may have disrupted the classroom because second graders are not able to understand that other have views different than their own and, when confronted by diverse views, they conclude that those views are dumb or bad. *Id.* In reaching its decision on this matter, the Court neither accepts nor rejects the opinion of Dr. Berndt but merely notes that the opinion supports the reasons advanced by Defendants for deciding not to permit the video.

As a result of the school's refusal to permit Kelly to show her videotape to her second grade class, Kelly and her mother brought suit against the Livonia Public Schools and certain school officials. The Complaint alleges violations of their Constitutional rights to freedom of speech, free exercise of religion, equal protection, freedom of association, and the liberty interest of a parent to educate her child.[5]

II. Standard for Summary Judgment

In considering a motion for summary judgment, the Court may grant the motion only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). As the Supreme Court ruled in *Celotex*, "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The court must view the allegations of the complaint in the light most favorable to the non-moving party. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cr. 1983). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 265, 106 S.Ct. 2505, 2518, 91 L.Ed.2d 202 (1986).

However, the mere existence of a scintilla of evidence in support of the non-movant is not sufficient; there must be sufficient evidence upon which a jury could reasonably find for the non-movant. *Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. at 2512. "The movant has the burden of showing that there is no

[5] Plaintiffs alleged various violations of state law as well. The Court previously dismissed these pendent claims pursuant to an Order signed by Judge Paul V. Gadola on October 28, 1991.

genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Id.* at 256, 106 S.Ct. at 2514. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue' for trial." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989) (citing *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

In this case, the parties have submitted cross motions for summary judgment, and there is no dispute concerning any material facts.

III. Freedom of Speech

[1, 2] Although the religion clauses of the First Amendment are implicated due to the religious character of the speech at issue in this case, in essence this is a free speech case. The First Amendment, applicable to the States via the Fourteenth Amendment, guarantees the right to free speech. *See, e.g., Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969). Students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506, 89 S.Ct. at 736. However, where student initiated speech occurs as part of the curriculum in the closed forum of a classroom, school authorities may limit the speech as long as their actions are "reasonably related to legitimate pedagogical concerns." *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

A. Forum Analysis

[3-6] In *Hazelwood*, the Supreme Court held that a school could control the style and content of student-authored articles published in the student newspaper. The Court first engaged in a forum analysis in order to determine the level of scrutiny required to evaluate the school's actions. There are three types of forums: traditional public forums, limited public forums, and closed forums. Traditional public forums include areas such as streets and parks that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." 484 U.S. at 267, 108 S.Ct. at 567 (quoting *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). Limited public forums are those created by the State when it opens its property for expressive activity. *Perry, Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983). The government may only restrict speech in public forums or limited pubic forums if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *Id.* at 45, 103 S.Ct. at 954. If State facilities have not been dedicated to public use but have instead been reserved for other purposes, they are closed forums. The State may impose reasonable restrictions on speech in closed forums. *Id.* at 46, 103 S.Ct. at 955.

[7] Schools are not traditional public forums. *Hazelwood*, 484 U.S. at 267, 108 S.Ct. at 567. However, school officials may create a limited public forum if, by policy or practice, they open the school for indiscriminate use by the public. *Id.* (citing *Perry*, 460 U.S at 48, 103 S.Ct. at 956). In *Hazelwood*, the Court held that school officials did not intend to open the school newspaper as a public forum for indiscriminate use by student reporters and editors or by the school body generally. The school newspaper was published as part of a journalism class taught by school faculty during school hours.

The journalism teacher maintained a great deal of editorial control; for instance, he selected the editors, assigned story topics, and edited stories. Although the students maintained some authority over the contents of the paper in order to learn leadership abilities, the school maintained ultimate control over the paper. The Court held that the paper was a closed forum and that school officials were entitled to regulate the paper's contents in any reasonable manner. *Id.* 484 U.S. at 268-70, 108 S.Ct. at 568-69.

Other courts have followed *Hazelwood* and found that classrooms are not public forums if there is no evidence that school authorities have opened them for indiscriminate public expression. *See, e.g., Miles v. Denver Public Schools*, 944 F.2d 773, 776 (10th Cir. 1991) (ninth grade classroom not public forum); *Bishop v. Aronov*, 926 F.2d 1066, 1071 (11th Cir. 1991) (university classrooms are not public forums during instructional period), *cert. denied sub nom. Bishop v. Delchampes*, __U.S.__, 112 S.Ct. 3026, 120 L.Ed. 2d 897 (1992).

In addition, several courts have emphasized that the difference in maturity level between the university level and that of the high school or elementary level make it less likely that the school would have opened the forum for unregulated speed. *See, e.g., Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), vacated on other grounds, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986) (because high school curriculum is circumscribed, unlikely that authorities opened forum for unlimited discussion); *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1401 (10th Cir. 1985) (reservations expressed in *Bender* apply with even greater force to elementary school).

One court, in addressing a case similar to this one, found that even where an elementary school teacher permits students to give oral presentations, the teacher has not opened the classroom for open discussion. *Duran v. Nitsche*, 780 F.Supp. 1048,

1053-54 (E.D.Pa.1991). In *Duran*, the teacher reviewed and approved of the students' reports prior to their oral presentations before their fifth grade class. The court emphasized that this review procedure belied any contention that the teacher had designated her classroom as an open forum.

[8] The undisputed facts establish that the Livonia Public Schools did not open the classrooms at McKinley Elementary School for unregulated public speech. The fact that Kelly DeNooyer was invited to speak in front of her class as part of a V.I.P. program, part of the regular curriculum, does not show that the school opened its doors for indiscriminate public expression. The fact that Mrs. Solomon previewed Kelly's tape indicates that closed nature of the classroom. Kelly DeNooyer's second grade classroom was a closed forum during class hours, at the time she wished to show her videotape. Because Kelly asserts a right to speech in a closed forum, the school authorities may regulate the content of her speech in any reasonable manner. *Hazelwood*, 484 U.S. at 270, 108 S.Ct. at 569.

B. School-Sponsored Speech

1. "Legitimate Pedagogical Concerns"

In addition to holding that speech in the closed forum of the classroom could be regulated in any reasonable manner, in *Hazelwood* the Supreme Court found that school-sponsored speech that is part of the curriculum also may be reasonably regulated. The Court distinguished *Tinker* as follows:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises.

> The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood, 484 U.S. at 270-71, 108 S.Ct. at 569-70. The Court held that school authorities may restrict school-sponsored expression so long as such restrictions are reasonably related to "legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. at 570.

The Supreme Court gave examples of permissible concerns. A school may ensure that the participants learn the lesson the activity is required to teach, that students are not presented with material inappropriate for their level of maturity, and that students' views are not mistakenly attributed to the school. *Id.* at 271, 108 S.Ct. at 570. Public schools may refuse to sponsor student speech that might associate the school with "any position other than neutrality on matters of political controversy." *Id.* at 272, 108 S.Ct. at 570. Even in *Tinker*, where speech that was not school-sponsored was at issue, the Supreme Court noted that a student's right to free speech in school is limited. While the Court upheld the right of high school and junior high school students to wear black armbands to school in protest of the Vietnam war, the Court stated that speech could be prohibited if it materially and substantially interfered with the needs of school discipline, would substantially interfere with the work of the school, or would impinge upon the rights of other students. 393 U.S. at 509, 89 S.Ct. at 737.

The Sixth Circuit Court of Appeals recently followed *Hazelwood* in *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021, 110 S.Ct. 723, 107 L.Ed.2d 742 (1990), where a student was disqualified from running for student council due to a speech he made at a school assembly. First, the Sixth Circuit found that the student's speech was school-sponsored. The school held an assembly during school hours and required that all students attend; the school determined the eligibility of the speakers at the assembly and screened the speeches. *Id.* at 762. Secondly, the court found that the actions of the school authorities were reasonably related to legitimate pedagogical concerns. In his speech, the student had ridiculed the assistant principal of the school. The court found that the school had a legitimate concern in promoting the values of discipline, courtesy, and respect for authority. *Id.*

Both the Supreme Court and the Sixth Circuit emphasized that the standard of review for censorship of school-sponsored speech is consistent with the policy that education is a matter of local concern for parents, teachers and school officials and not for federal judges. *Hazelwood*, 484 U.S. at 273, 108 S.Ct. at 571. Local control over schools is "one of this nation's most deeply rooted and cherished traditions." *Poling*, 872 F.2d at 763.

> Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude in choosing which pedagogical values to emphasize, and in choosing the means through which those values are to be promoted. We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them.

Id. at 762.

Following the reasoning of *Hazelwood* and *Poling*, the Eastern District of Pennsylvania found no violation of the right

to free speech in a case almost identical to this one. In *Duran v. Nitsche*, 780 F.Supp. 1048, a fifth grader claimed that her right to free speech was violated when her teacher refused to permit her to give an oral presentation to her class about her belief in God. The court found that the speech at issue could be limited by constraints of school sponsored speech. "As for the oral report, it could be said that it strains language even to call the presentation school 'sponsored.' Because it was part of an assignment related to an actual class, the report was, in fact, school itself." *Id.* at 1054 n. 8.

Further, in *Duran*, the court found that the actions of the school authorities were based upon reasonable pedagogical concerns, i.e., that the religious nature of the speech was inappropriate for the level of maturity students have reached in fifth grade. The court held that it was reasonable for the school not to want to take the substantial risk that the students' views would be erroneously attributed to the school. *Id.* at 1055-56.

[9] In this case, Kelly DeNooyer sought to show a videotape of herself singing a proselytizing religious song as part of a "V.I.P." program in her second grade classroom. The V.I.P. program was a show and tell activity conducted as part of the regular curriculum during class hours. Kelly's teacher, Mrs. Solomon, determined the selection of students for the program and screened the presentations made by the students. As in *Duran*, Kelly's presentation to her class was a class assignment; it was more than school-sponsored speech, it was "school itself."

Further, the Livonia school authorities had legitimate pedagogical interests in deciding that Kelly DeNooyer should not show her video. The purpose of the V.I.P. program was to teach children oral communications skills. Showing a videotape would circumvent this purpose. The school authorities wanted to avoid encouraging other children to bring in videotapes, because showing them preempts instructional time. The school had a policy of having all videotapes reviewed before classroom

use. Moreover, because the show and tell was conducted during classroom instructional time, all students were required to attend. The school wanted to avoid a situation where other students and their parents would be offended by the religious content of the speech they were required to listen to or would infer the school's endorsement of the speech presented during class. The maturity level of the second grade students was a significant concern.

2. Establishment Clause Defense

The Defendants have raised the Establishment Clause issue as a defense to Plaintiff's claims. If this case were one that involved nonschool-sponsored speech in a public forum, the State could regulate it based on its content only if it had a compelling interest to do so. Avoiding a violation of the Establishment Clause could be such a compelling reason. *See e.g., Bell v. Little Axe*, 766 F.2d at 1407 (establishment clause violation is compelling interest that justifies content-based prohibition of religious speech at public school); *Lundberg v. West Monona Community School Dist.*, 731 F.Supp. 331, 341 (N.D.Iowa 1989) (interest in avoiding establishment of religion outweighs right to free speech and free exercise and thus prayer at graduation should not be allowed).

In this case, however, the Court need only find that concern about the impact of the religious message of the tape on a second grade audience, presented during class time, was a legitimate pedagogical concern. The Court need not decide that a contrary decision by the Defendants would have violated the Establishment Clause. The Court's discussion of the Defendants' rationale in refusing to permit the video based on the ability of the second grade students to distinguish between private speech and school sponsored speech should not be confused with an inquiry under the Establishment Clause. This Court merely finds that the School District's restriction on Kelly's speech was reasonable, regardless of whether permitting the speech would

have violated the Establishment Clause. *Duran*, 780 F.Supp. at 1056.

C. Use Versus Access

Plaintiffs argue that forum analysis is appropriate only where *access* to State property is at issue, as in *Hazelwood*, and is inappropriate where *use* of State property is at issue, as in *Tinker*. This contention is without merit. The Supreme Court has not made the "use" versus "access" distinction urged by Plaintiffs. The Supreme Court in *Hazelwood* distinguished *Tinker* by holding that *Tinker* was not school-sponsored speech. As explained above, *Hazelwood* uses forum analysis and is directly applicable to this case; thus, this Court relies on *Hazelwood*.

Further, school speech cases that fail to use public forum analysis are factually distinguishable from *Hazelwood* and from the case at bar. *Hazelwood*, like this case, involved student expression in the classroom that was part of the curriculum and was sponsored by the school. The cases cited by Plaintiffs that did not use forum analysis involved extra-curricular student distribution of written material on school property. *See, e.g., Slotterback v. Interboro School Dist.*, 766 F.Supp. 280 (E.D.Pa. 1991) (distribution of religious tracts in public high school); *Rivera v. East Otero School Dist.*, 721 F.Supp. 1189 (D.Colo. 1989) (distribution of religious newspaper in public high school).

In arguing the use versus access dichotomy, Plaintiffs rely upon a law review article published before *Hazelwood* and a law review published later that relies on the first article. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious by Private Speakers*, 81 NW Univ.L.Rev. 1, 48 (1986) [hereinafter cited as *Laycock*]; Whitehead, *Avoiding Religious Apartheid: Affording Equal Treatment for Student-Initiated Religious Expression in Public Schools*, 16 Pepperdine L.Rev. 229, 247-48 (1989). The original commentator did not

have *Hazelwood* available to him when he suggested the use/access distinction, and the Supreme Court's analysis in *Hazelwood* defies this categorization.

Plaintiffs' assertion that *Hazelwood* is an "access" case and thus is distinguishable from *Tinker* is without merit. The distinction between "use" cases and "access" cases has not clearly been defined. The law review commentator who appears to have originated the "use versus access" idea argued as follows: "public forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak." *Laycock*, 81 N.W.L.Rev. at 48. Under this standard, *Tinker*, *Hazelwood*, and this case are all cases where the "use" of the forum is at issue. In *Tinker*, the students engaged in speech at school, a place where they had a right to be, by wearing armbands in protest of the Vietnam war. In *Hazelwood*, journalism class students wrote articles for a school paper. The students already had access to the forum, the newspaper.

Here, Kelly DeNooyer had a right to be in her classroom participating in a show and tell presentation. She is not seeking "access" to the classroom. Like *Hazelwood*, this case is readily distinguishable from those where a group is seeking access to use a classroom for the group's meetings. *See, e.g., Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (registered student group sought access to state university facilities for religious worship and discussion; Court engaged in forum analysis). Thus, even in a case dealing with the *use* of public property, the Supreme Court analyzed the type of forum being used for the contested speech. *Hazelwood*, 484 U.S. at 267-70, 108 S.Ct. at 567-69. As described above, the second grade classroom was a closed forum subject to reasonable restrictions and legitimate pedagogical concerns, and the Court finds that the reasons expressed by the Defendants meet that requirement.

IV. Free Exercise

[10] Plaintiffs state in Count II of their Complaint that Defendants violated their rights under the Free Exercise Clause of the First Amendment by placing a burden on Kelly DeNooyer's ability to freely exercise her religious beliefs. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling government interest justifies the burden." *Hernandez v. C.I.R.*, 490 U.S. 680, 699, 109 S.Ct. 2136, 2148, 104 L.Ed.2d 766 (1989). Plaintiffs fail to name the central religious belief that they allege is burdened by the school authorities' censorship of the videotape.

In a factually similar case, another district court found that a school district's prohibition of public prayer as part of a graduation ceremony did not violate the complainants' rights under the Free Exercise Clause. *Lundberg v. West Monona Community School Dist.*, 731 F.Supp. 331 (N.D.Iowa 1989). In *Lundberg*, the school district voted be ban invocation and benediction at the high school graduation. A student, his father, and parents of other students sued the school district claiming that their right to freely exercise their religion was violated. Plaintiffs alleged that under the tenets of their religion "it is appropriate, proper and desirable to acknowledge the spiritual aspects of life upon such as occasion by way of including a simple invocation and benediction as part of the ceremonial event." The court found that although prayer may be a cardinal principle of the claimants' religious beliefs, *public* prayer was not. *Id.* at 340.

The court reasoned further that although the First Amendment prohibits the state from compelling an individual to affirm or disclaim a religious belief, the right to free exercise of religion does not mean that an individual can "use the machinery of the state to practice [her] beliefs." *Id.* at 340 (citing *Abington School Dist. v. Schempp*, 374 U.S. 203, 226, 83 S.Ct. 1560, 1573, 10

L.Ed.2d 844 (1963)). *See also Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (because students were not required to affirm or disaffirm any religious beliefs by using textbooks they found offensive to their religion, they were not compelled in violation of free exercise clause), *cert. denied*, 484 U.S. 1066, 108 S.Ct. 1029, 98 L.Ed.2d 993 (1988).

The government is not required to join in a religious practice or to take action to further the beliefs or spiritual development of individuals. *Id.* (citing *Bowen v. Roy*, 476 U.S. 693, 699-700, 106 S.Ct. 2147, 2151-2152, 90 L.Ed.2d 735 (1986)). In a case rejecting a claim that the Free Exercise Clause required a school district to permit prayer in the classroom, the Second Circuit noted, "The authorities acted well within their powers in concluding that plaintiffs must content themselves with having their children say these prayers before nine or after three; their action presented no such inexorable conflict with deeply held religious belief...." *Stein v. Oshinsky*, 348 F.2d 999, 1002 (2d Cir.), *cert. denied*, 382 U.S. 957, 86 S.Ct. 435, 15 L.Ed.2d 361 (1965).

Plaintiffs have not brought forth any evidence that the school's decision to prevent Kelly DeNooyer from showing her videotape during class substantially burdened any central religious belief or practice.[6] Further, school authorities are not required to take action that would advance Plaintiffs' religious beliefs. As a result, Plaintiffs' have failed to bring forth evidence to support their claim under the Free Exercise Clause. Rule 56 thus requires the Court to grant summary judgment for the Defendants.

---

[6] Plaintiffs do not name any central religious belief or practice burdened by Defendants. It should be noted the proselytizing is *not* an obligation of the Baptist religion. (Ilene DeNooyer 135-36).

V. Equal Protection

[11] Plaintiffs contend that the school censored Kelly's video due to its content, a particular Christian message, and that another student was permitted to discuss a menorah (a Jewish religious symbol) at show and tell. Thus, they argue, their right to equal protection under the Fourteenth Amendment was violated. By alleging that the school authorities interfered with their fundamental right to free speech, Plaintiffs impliedly request that the Court apply strict scrutiny to the actions of the Defendants.

The Court has already concluded that no violation of a fundamental right was implicated in this case. As discussed above, Plaintiffs' rights to free speech and to free exercise were not violated. In addition, Plaintiffs do not allege that they are members of any suspect class. When a plaintiff is not a member of a suspect class and no fundamental right is implicated, the inquiry under the equal protection clause is whether the state action rationally furthers a legitimate state purpose. *Carlson v. Village of Union City*, 601 F.Supp. 801, 812-13 (W.D.Mich. 1985) (citing *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 55, 93 S.Ct. 1278, 1308, 36 L.Ed.2d 16 (1973)). *See Brown v. Alexander*, 718 F.2d 1417, 1423 (6th Cir. 1983) (strict scrutiny does not apply because there was no First Amendment violation). Thus, strict scrutiny does not apply, and the actions of the school authorities do not violate the equal protection clause as long as there was a rational basis for such actions.

The Livonia School authorities had a rational basis for prohibiting Kelly DeNooyer from playing her video and for permitting another student, Amber Cole, to talk about the menorah during a presentation regarding Israel. The school officials wanted to encourage students to develop their classroom communication skills and wanted to avoid using instructional time for the showing of videos. Playing Kelly DeNooyer's videotape

would not advance these goals, and permitting Amber Cole's speech would. Further, school authorities wanted to avoid offending other students and parents. It was not unreasonable for the Defendants to conclude that Kelly's proselytizing song might offend other students and their parents, while the showing of a menorah or the discussion of its use would be unlikely to cause controversy.[7]

Further, as Dr. Gage noted in his letter to Mrs. DeNooyer, "a teacher may teach about religion. . . but shall not act as a disseminating agent for any religious or anti-religious document, book, article, person, agency or the like." The School District's concern that it might violate the Establishment Clause by playing Kelly's videotape of a proselytizing song is a rational basis for refusing to show the tape.[8] Playing the video might put the school in the position of acting as a "disseminating agent" for religion, a role prohibited by school policy. A discussion of the use of the menorah during a speech on the State of Israel falls in the category of speech permitted by the School District's policy, i.e., speech "about religion."

In sum, because Defendants have articulated a rational basis for their decisions distinguishing between the presentations of the two students, Plaintiffs have no equal protection claim. Summary judgment on this issue is granted in favor of the Defendants.

---

[7] Plaintiffs contend that Amber Cole brought on a menorah during her V.I.P. week as part of show and tell. Plaintiff's Brief in Support of Motion for Summary Judgment, p. 4. Defendants assert that the student merely discussed the use of the menorah during a talk on the State of Israel. (Kelly DeNooyer 14-15). In either case, the school authorities had a rational basis for distinguishing between Kelly DeNooyer's videotape and Amber Cole's speech.

[8] Again, even though this is a reasonable concern, the Court does not hold that the playing of the videotape would have constituted an unconstitutional establishment of religion. It is not necessary to reach the Establishment Clause issue in this case.

VI. Freedom of Association and Liberty Interest

Plaintiffs also allege that they were deprived of their right of free association. Complaint, Count II. Ilene DeNooyer also contends that Defendants violated her liberty interest "to instill in her daughter certain moral and religious values as central to her education and upbringing." Complaint, Count III, para. 35. No evidence has been presented to support these propositions. "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v. Liberty Lobby*, 477 U.S. at 256, 106 S.Ct. at 2514. Summary judgment is hereby granted on these claims as well.

Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment is DENIED and Defendants' motion for summary judgment is GRANTED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-2080

ILENE DENOOYER AND KELLY E. DENOOYER,
Plaintiffs-Appellants,

v.

JOSEPH MERINELLI, JANE VAN POPERIN,
KENT GAGE, CAROLE SAMPLES,
LIVONIA PUBLIC SCHOOLS,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

FILED AUG. 3, 1993
LEONARD GREEN, Clerk

**NOT RECOMMENDED FOR
FULL TEXT PUBLICATION**

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to *prominently* displayed if this decision is reproduced.

BEFORE: MILBURN and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. Plaintiffs Kelly DeNooyer, by her next friend and mother, Ilene DeNooyer, and Ilene DeNooyer appeal from the district court's summary judgment for defendants Livonia Public Schools, Carole Samples, Dr. Kent Gage, Jane Van Poperin and Joseph Merinelli, in this civil rights action brought under 42 U.S.C. § 1983 challenging the defendants' right to prohibit a second grade student from showing her class a videotape of herself singing a religious proselytizing song in a church service. On appeal, the issues presented are (1) whether defendants violated a student's First Amendment right to free expression when they prohibited her from showing a videotape of herself singing a religious song in church to her second grade classmates during "show and tell," (2) whether defendants violated a student's First Amendment right to the free expression of her religious beliefs when they prohibited her from showing the videotape, (3) whether defendants violated a student's Fourteenth Amendment right to equal protection of the laws when they prohibited the student from showing her videotape while permitting another student to tell the class how menorahs were used in Israel, (4) whether defendants violated a student's First Amendment right to freedom of association when they prevented her from showing her videotape, and (5) whether defendants violated the Fourteenth Amendment liberty interest of the student's mother to instill religious principles in her child when they prevented the showing of the videotape. For the reasons that follow, we affirm.

I.

The material facts of this case are undisputed. Plaintiff Kelly DeNooyer was enrolled in the second grade at McKinley Elementary School in Livonia, Michigan, for the school year 1990-91. In December 1990, Kelly's teacher, Ms. Solomon, started a program in her classroom called "VIP of the Week."

The program was submitted to and approved by defendant Van Poperin, the principal of McKinley Elementary School, thus becoming part of the curriculum for second grade students in Ms. Solomon's class. The program called for the weekly selection of a student VIP, who would wear an identifying badge and bring to class various items to describe to his or her classmates. The primary purpose of this program was to increase the students' self-confidence and poise by focusing attention on them and giving them the opportunity to make verbal presentations to the class about items that were interesting or important to them.

In December 1990, Kelly DeNooyer was chosen "VIP of the Week." On December 13, 1990, Kelly DeNooyer brought a videotape to class and asked that it be shown. The videotape recorded her performance of a religious song at a worship service of the Temple Baptist Church of Redford, Michigan, of which she and her parents were members.

The song describes the benefits of a child's early relationship with Jesus Christ and the importance of turning over one's "childish heart of sin" in order to be saved. In her deposition, Kelly DeNooyer testified that she wanted to share the message of the song with her classmates "[b]ecause I might have a chance to help people get saved." J.A. 105.

When she received the videotape from Kelly DeNooyer, Ms. Solomon previewed it privately and concluded that it was inappropriate for her classroom for several reasons. First, the videotape had not been approved for showing to her class as required by school district policy. Second, Ms. Solomon believed that allowing any child to show a videotape would frustrate the purpose of the VIP program, which was designed to develop students' self-confidence and verbal communication skills by requiring oratory before the class. Putting a videotape into a machine would not accomplish that purpose. Third, Ms. Solomon believed that the precedent thus established would

waste her instructional time when other students brought in videotapes, which would in turn require previewing by the teacher and approval by the school district. Ms. Solomon would also have to arrange for videotape replay equipment to be brought to the classroom. Finally, Ms. Solomon was concerned about the videotape's religious message, which she believed was inappropriate for second graders in a public school classroom. She feared her students would assume she and the school endorsed the message of the song and that the song's message and her presumed endorsement of it might embarrass or offend other students in the classroom who were not Christians.

Ms. Solomon discussed her concerns with Jane Van Poperin, the school principal, who agreed that the videotape should not be shown. Ms. Solomon then took Kelly aside and told her that she would not be able to show the videotape. Thereafter, Ilene DeNooyer, Kelly's mother, discussed the matter with Ms. Solomon and Ms. Van Poperin, as well as Dr. Kent Gage, the Director of Elementary Education, and Carole Samples, Assistant Superintendent for Instruction. All of Ms. Solomon's superiors concurred in her decision. Ilene DeNooyer did not discuss the matter with defendant, Joseph Merinelli, Superintendent of Schools, or any member of the board of education.

On June 14, 1991, plaintiffs filed this action in the district court pursuant to 42 U.S.C. § 1983, alleging that defendants violated Kelly DeNooyer's First Amendment rights to freedom of expression, freedom of association, and freedom to exercise her religion. Plaintiffs further alleged that defendants violated Kelly DeNooyer's Fourteenth Amendment right to equal protection of the law and Ilene DeNooyer's Fourteenth Amendment liberty interest in instilling in her daughter the religious beliefs of the family. On cross motions for summary judgment, the district court entered judgment for the defendants, and this timely appeal followed.

II.

A.

Under Federal Rule of Civil Procedure 56, summary judgement may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This court reviews the district court's grant of summary judgment de novo. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). By agreement of the parties, there is no genuine issue of material fact remaining in this case. The only remaining questions are questions of law, which are likewise reviewable de novo. *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989).

B.

Plaintiffs argue that the district court erred in determining that Kelly DeNooyer's First Amendment right to free expression was not violated when the school decided not to show her videotape. In particular, they contend that the district court should have applied the standards set out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), rather than those in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Tinker*, however, does not govern this case, because in *Hazelwood*, a more analogous case, the Supreme Court held that a school may reasonably regulate student expression within the closed forum of a classroom without violating the First Amendment's guarantee of free expression.

> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial

> control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.

Id., 484 U.S. at 272-73 (emphasis added).

When these principles are applied to the present case, it is clear that Kelly DeNooyer's proposed presentation was part of the class curriculum and was, therefore, school-sponsored expression. Because the school had not opened the classroom for use as a public forum, it could regulate both the style and the content of Kelly DeNooyer's presentation, provided its regulation was reasonably related to legitimate pedagogical concerns of the school.

According to the testimony of Ms. Solomon, her primary "pedagogical concern," the aim of the "VIP of the Week" program, was to increase her students' verbal communications skills by requiring a "live" classroom presentation by the student on some subject of his or her choosing. That concern would be frustrated if every student were permitted to show a videotape of himself or herself doing some activity at another location. Furthermore, the use of a videotape was of concern to Ms. Solomon because it imposed burdens on her as a teacher by forcing her to take time (1) to have the videotape approved by the school district according to its policy, (2) to preview the tape herself for classroom suitability, and (3) to arrange for the necessary replay equipment to be brought to the classroom. These pedagogical concerns apply to the "style" of the presentation, that is, the medium of the video tape itself, regardless of its content.

Of course, when Ms. Solomon considered the contents of the videotape, other concerns arose in her mind having to do with the controversial issue of religion in the schools, particularly concerns over the possibility of violating the Establishment Clause of the First Amendment and the impact of the videotape

on immature second graders of varying religious viewpoints. Ms. Solomon discussed these concerns about the medium and the message of Kelly DeNooyer's expression with her superiors, and her superiors agreed with her objections to the videotape.

Every one of the reasons given by Ms. Solomon for her decision not to show the videotape is strongly related to a legitimate pedagogical concern. The videotape medium frustrated her effort to build her student's speaking skills, and it wore away at the limited time she has available by requiring a preview and the use of equipment not normally present in the classroom. The content of the videotape raised serious questions about how her immature students would react to a religious message from what, to some of them, was an alien religion. The controversial content of the videotape also raised questions about whether the school would be seen to have given its imprimatur to religious proselytizing during the school curriculum. A collateral problem would be the difficulty of formulating a disclaimer of official sponsorship that would not utterly confuse or disturb seven and eight-year-old children. These matters all involve "judgment call[s] best left to the locally elected school board, not to a distant, life-tenured judiciary," *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990), for

> the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.

Hazelwood, 484 U.S. at 273. Thus, the school's reasons for regulating both the medium and the message in this case are sensible ones related to the efficient accomplishment of the school's educational mission.

C.

For the reasons stated, we hold that the district court did not err in finding the school's actions to be reasonably related to legitimate pedagogical concerns, and we AFFIRM the district court's grant of summary judgment as to this issue. As to the other issues raised in this appeal, we AFFIRM the district court's grant of summary judgment for the reasons stated in its memorandum opinion. *See DeNooyer by DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D. Mich. 1992).

C1

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-2080

ILENE DENOOYER AND KELLY E. DENOOYER,
Plaintiffs-Appellants,

v.

JOSEPH MERINELLI, ET AL.,
Defendants-Appellees.

FILED
NOV. 18, 1993

ORDER

BEFORE: MILBURN, and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing, in light of which it has filed simultaneously with this order an opinion to substitute for that previously filed on August 3, 1993. The petition for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

D1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 92-2080

ILENE DENOOYER AND KELLY E. DENOOYER,
Plaintiffs-Appellants,

v.

JOSEPH MERINELLI, JANE VAN POPERIN,
KENT GAGE, CAROLE SAMPLES,
LIVONIA PUBLIC SCHOOLS,
Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

FILED NOV. 18, 1993
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to *prominently* displayed if this decision is reproduced.

BEFORE: MILBURN and NORRIS, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. Plaintiffs Kelly DeNooyer, by her next friend and mother, Ilene DeNooyer, and Ilene DeNooyer appeal from the district court's summary judgment for defendants Livonia Public Schools, Carole Samples, Dr. Kent Gage, Jane Van Poperin and Joseph Merinelli, in this civil rights action brought under 42 U.S.C. § 1983 challenging the defendants' right to prohibit a second grade student from showing her class a videotape of herself singing a religious proselytizing song in a church service. On appeal, the issues presented are (1) whether defendants violated a student's First Amendment right to free expression when they prohibited her from showing a videotape of her singing a religious song in church to her second grade classmates during "show and tell," (2) whether defendants violated a student's First Amendment right to the free expression of her religious beliefs when they prohibited her from showing the videotape, (3) whether defendants violated a student's Fourteenth Amendment right to equal protection of the laws when they prohibited the student from showing her videotape while permitting another student to tell the class how menorahs were used in Israel, (4) whether defendants violated a student's First Amendment right to freedom of association when they prevented her from showing her videotape, and (5) whether defendants violated the Fourteenth Amendment liberty interest of the student's mother to instill religious principles in her child when they prevented the showing of the videotape. For the reasons that follow, we affirm.

I.

The material facts of this case are undisputed. Plaintiff Kelly DeNooyer was enrolled in the second grade at McKinley Elementary School in Livonia, Michigan, for the school year 1990-91. In December 1990, Kelly's teacher, Ms. Solomon, started a program in her classroom called "VIP of the Week."

The program was submitted to and approved by defendant Van Poperin, the principal of McKinley Elementary School, thus becoming part of the curriculum for second grade students in Ms. Solomon's class. The program called for the weekly selection of a student VIP, who would wear an identifying badge and bring to class various items to describe to his or her classmates. The primary purpose of this program was to increase the students' self-confidence and poise by focusing attention on them and giving them the opportunity to make verbal presentations to the class about items that were interesting or important to them.

In December 1990, Kelly DeNooyer was chosen "VIP of the Week." On December 13, 1990, Kelly DeNooyer brought a videotape to class and asked that it be shown. The videotape recorded her performance of a religious song at a worship service of the Temple Baptist Church of Redford, Michigan, of which she and her parents were members.

The song describes the benefits of a child's early relationship with Jesus Christ and the importance of turning over one's "childish heart of sin" in order to be saved. In her deposition, Kelly DeNooyer testified that she wanted to share the message of the song with her classmates "[b]ecause I might have a chance to help people get saved." J.A. 105.

When she received the videotape from Kelly DeNooyer, Ms. Solomon previewed it privately and concluded that it was inappropriate for her classroom for several reasons. First, the videotape had not been approved for showing to her class as required by school district policy. Second, Ms. Solomon believed that allowing any child to show a videotape would frustrate the purpose of the VIP program, which was designed to develop students' self-confidence and verbal communication skills by requiring oratory before the class. Putting a videotape into a machine would not accomplish that purpose. Third, Ms. Solomon believed that the precedent thus established would

waste her instructional time when other students brought in videotapes, which would in turn require previewing by the teacher and approval by the school district. Ms. Solomon would also have to arrange for videotape replay equipment to be brought to the classroom. Finally, Ms. Solomon was concerned about the videotape's religious message, which she believed was inappropriate for second graders in a public school classroom. She feared her students would assume she and the school endorsed the message of the song and that the song's message and her presumed endorsement of it might embarrass or offend other students in the classroom who were not Christians.

Ms. Solomon discussed her concerns with Jane Van Poperin, the school principal, who agreed that the videotape should not be shown. Ms. Solomon then took Kelly aside and told her that she would not be able to show the videotape. Thereafter, Ilene DeNooyer, Kelly's mother, discussed the matter with Ms. Solomon and Ms. Van Poperin, as well as Dr. Kent Gage, the Director of Elementary Education, and Carole Samples, Assistant Superintendent for Instruction. All of Ms. Solomon's superiors concurred in her decision. Ilene DeNooyer did not discuss the matter with defendant, Joseph Merinelli, Superintendent of Schools, or any member of the board of education.

On June 14, 1991, plaintiffs filed this action in the district court pursuant to 42 U.S.C. § 1983, alleging that defendants violated Kelly DeNooyer's First Amendment rights to freedom of expression, freedom of association, and freedom to exercise her religion. Plaintiffs further alleged that defendants violated Kelly DeNooyer's Fourteenth Amendment right to equal protection of the law and Ilene DeNooyer's Fourteenth Amendment liberty interest in instilling in her daughter the religious beliefs of the family. On cross motions for summary judgment, the district court entered judgment for the defendants, and this timely appeal followed.

II.

A.

Under Federal Rule of Civil Procedure 56, summary judgement may be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. This court reviews the district court's grant of summary judgment de novo. *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). By agreement of the parties, there is no genuine issue of material fact remaining in this case. The only remaining questions are questions of law, which are likewise reviewable de novo. *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989).

B.

Plaintiffs argue that the district court erred in determining that Kelly DeNooyer's First Amendment right to free expression was not violated when the school decided not to show her videotape. In particular, they contend that the district court should have applied the standards set out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), rather than those in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Tinker*, however, does not govern this case, because in *Hazelwood*, a more analogous case, the Supreme Court held that a school may reasonably regulate student expression within the closed forum of a classroom without violating the First Amendment's guarantee of free expression.

> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial

> control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.

Id., 484 U.S. at 272-73 (emphasis added).

When these principles are applied to the present case, it is clear that Kelly DeNooyer's proposed presentation was part of the class curriculum and was, therefore, school-sponsored expression. Because the school had not opened the classroom for use as a public forum, it could regulate both the style and the content of Kelly DeNooyer's presentation, provided its regulation was reasonably related to legitimate pedagogical concerns of the school.

According to the testimony of Ms. Solomon, her primary "pedagogical concern," the aim of the "VIP of the Week" program, was to increase her students' verbal communications skills by requiring a "live" classroom presentation by the student on some subject of his or her choosing. That concern would be frustrated if every student were permitted to show a videotape of himself or herself doing some activity at another location. Furthermore, the use of a videotape was of concern to Ms. Solomon because it imposed burdens on her as a teacher by forcing her to take time (1) to have the videotape approved by the school district according to its policy, (2) to preview the tape herself for classroom suitability, and (3) to arrange for the necessary replay equipment to be brought to the classroom. These pedagogical concerns apply to the "style" of the presentation, that is, the medium of the video tape itself, regardless of its contents. This concern as to the medium of videotape being sufficient to affirm the district court, it is unnecessary to rule on the other reasons presented by the defendants.

C.

For the reasons stated, we hold that the district court did not err in finding the school's rejection of the showing of the videotape to be reasonably related to legitimate pedagogical concerns, and we AFFIRM the district court's grant of summary judgment as to this issue. As to the other issues raised in this appeal, we AFFIRM the district court's grant of summary judgment for the reasons stated in its memorandum opinion. *See DeNooyer by DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D. Mich. 1992).

Supreme Court, U.S.
F
MAR 2 3 1994

(2)

No. 93-1323

In The

Supreme Court of the United States

October Term, 1993

KELLY E. DENOOYER,
by next friend ILENE DENOOYER, and ILENE DENOOYER,
Petitioners,

v.

LIVONIA PUBLIC SCHOOLS,
CAROLE SAMPLES, individually and in her official capacity as Assistant Superintendent for Instruction, DR. KENT GAGE, individually and in his capacity as Director of Elementary Education, JANE VAN POPERIN, individually and in her official capacity as Principal of McKinley Elementary School, and JOSEPH MERINELLI, individually and in his official capacity as Superintendent,
Respondents.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ALEXIS I. CROW
Counsel of Record
ANNE-MARIE AMIEL
The Rutherford Institute
1445 East Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

DAVID R. MELTON
O-932 Chicago Drive
Jenison, Michigan 49428-9351
(616) 457-4700

ROBERT A. LUSK
Counsel of Record
CHRISTOPHER M. MURRAY
KELLER, THOMA, SCHWARZE, SCHWARZE, DUBAY & KATZ, P.C.
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610
Attorneys for Respondents

March 23, 1994

Interstate Brief & Record Company, *a division of* North American Graphics, Inc.
1629 West Lafayette Boulevard, Detroit, MI 48216 (313) 962-6230

33 pp

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT THE PETITION WHERE PETITIONERS HAVE NOT: IDENTIFIED ANY IMPORTANT ISSUE OF LAW THAT HAS NOT BEEN ADDRESSED BY THIS COURT'S EXISTING DECISIONS; IDENTIFIED ANY CONFLICT AMONG THE CIRCUITS REGARDING THE ISSUES INVOLVED IN THIS CASE; AND, HAVE NOT DEMONSTRATED THAT THE LOWER COURTS' OPINIONS ARE INCONSISTENT WITH ANY DECISION OF THIS COURT?

II.

WHETHER THE LOWER COURTS CORRECTLY HELD THAT RESPONDENTS HAD NOT VIOLATED PETITIONERS' FIRST AMENDMENT RIGHTS TO FREE EXPRESSION BY DECLINING TO COMPEL SECOND GRADE STUDENTS TO WATCH A PROSELYTIZING VIDEOTAPE IN A PUBLIC SCHOOL CLASSROOM DURING INSTRUCTIONAL TIME?

III.

WHETHER THE LOWER COURTS ERRED IN REJECTING THE FOLLOWING ARGUMENTS ADVANCED BY PETITIONERS:

A. Forum Analysis Does Not Apply To An "Insider" Seeking To "Use" Public School Facilities As Opposed To An "Outsider" Seeking "Access" To Public School Facilities;

B. A Public School Classroom Becomes An Open Forum Or Limited Open Forum When A Teacher Permits Students To Participate In A Curriculum Related Communicative Activity;

C. Respondents Engaged In Viewpoint Discrimination By Declining To Compel Second Grade Students To Watch A Proselytizing Videotape In A Public School Classroom During Instructional Time Where It Is

Undisputed That Most Of The Reasons Why Respondents Declined To Show The Videotape Had Nothing To Do With Its Message; And,

D. Whether The Establishment Clause Permits Public Schools To Treat Religion Like Any Other Subject And, If So, Whether The Record Supports Petitioners' Argument That The School District Discriminated Against Religion.

TABLE OF CONTENTS

PAGE

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

INDEX OF CONTROLLING AUTHORITY iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT:

I. PETITIONERS HAVE NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT THEIR PETITION. 9

II. THE LOWER COURTS CORRECTLY HELD THAT RESPONDENTS HAD NOT VIOLATED PETITIONERS' FIRST AMENDMENT RIGHT TO FREE EXPRESSION BY PROHIBITING THEM FROM COMPELLING SECOND GRADE STUDENTS TO WATCH A PROSELYTIZING VIDEOTAPE IN A PUBLIC SCHOOL CLASSROOM DURING INSTRUCTIONAL TIME. 9

III. THE REASONS PETITIONERS HAVE ADVANCED IN FAVOR OF GRANTING THE PETITION ARE NOT SUPPORTED BY THE DECISIONS OF THIS COURT, OR ANY OTHER, AND ARE INCONSISTENT WITH THIS COURT'S WELL-ESTABLISHED FIRST AMENDMENT JURISPRUDENCE. 17

A. Petitioners' Argument That Forum Analysis Does Not Apply To "Use" As Opposed To "Access" Cases Is Inconsistent With The Court's *Hazelwood* Decision And Does Not Provide A Meaningful Basis For Distinguishing Between "Use" And "Access" Cases. 18

B. Petitioners' Argument That Ms. Solomon Transformed Her Second Grade Classroom From A Closed Forum Into A Limited Open Forum By Initiating The VIP

PAGE

Program Is Not Consistent With *Hazelwood* And Not Supported By Any Opinion Of This Court Or Any Other Court. 20

C. Petitioners' Argument That The School District Engaged In Unconstitutional Viewpoint Discrimination Was Not Raised Below And Is Contradicted By The Undisputed Facts Of This Case. 22

D. Petitioners' Argument That The School District Must Treat Religion As Any Other Subject Unless Distinctions Are Based On Compelling Governmental Interests Is Inconsistent With This Court's Establishment Clause Jurisprudence. 23

CONCLUSION 26

INDEX OF CONTROLLING AUTHORITY

United States Supreme Court:

Airport Commissioners v. *Jews for Jesus, Inc.*, 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987) 18, 19

Bethel School District v. *Fraser*, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549 (1986) 14

Edwards v. *Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) 24

Engel v. *Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) 24

Epperson v. *Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) 24

Hazelwood School District v. *Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) 8, 10, 11, 12, 13, 18, 19, 20

PAGE

Illinois ex. rel. McCollum v. *Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) 23

Lee v. *Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) 24, 25

Perry Education Association v. *Perry Local Educators Association*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) 10, 18

School District of Abington Township v. *Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) 24

School District of the City of Grand Rapids v. *Ball*, 473 U.S. 373, 105 S. Ct. 3216, 87 L. Ed. 2d 267 (1985) 24

Stone v. *Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1981) 24

Taylor v. *Freckind and Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 118 L. Ed. 2d 280 (1992) 22

Tinker v. *Des Moines Independent School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) 13

United States v. *Kokinda*, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) 10, 18

Wallace v. *Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) 24

United States Court of Appeals:

Bishop v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991) 13

Miles v. *Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991) 13

Planned Parenthood v. *Clark County School District*, 887 F.2d 935 (9th Cir. 1989) 14

PAGE

Poling v. *Murphy*, 872 F.2d 757 (6th Cir. 1989) 13

United States District Court:

DeNooyer by DeNooyer v. *Livonia Public Schools*, 799 F. Supp. 744 (E.D. Mich. 1992) 7, 8, 15-17, 19

Doe v. *Human*, 725 F. Supp. 1503 (W.D. Ark. 1989) 14

Hemry by Hemry v. *School Board of Colorado Springs*, 760 F. Supp. 856 (D. Colo. 1991) 13

Lundberg v. *West Monona Community School District*, 731 F. Supp. 331 (N.D. Iowa 1989) 14

No. 93-1323

In The

Supreme Court of the United States

October Term, 1993

KELLY E. DENOOYER,
by next friend ILENE DENOOYER, and ILENE DENOOYER,
Petitioners,

v.

LIVONIA PUBLIC SCHOOLS,
CAROLE SAMPLES, individually and in her official capacity as Assistant Superintendent for Instruction, DR. KENT GAGE, individually and in his capacity as Director of Elementary Education, JANE VAN POPERIN, individually and in her official capacity as Principal of McKinley Elementary School, and JOSEPH MERINELLI, individually and in his official capacity as Superintendent,
Respondents.

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners are Kelly DeNooyer and her mother, Ms. Ilene DeNooyer. Kelly is enrolled as a student in Respondent, Livonia Public Schools' McKinley Elementary School. The other Respondents are Ms. Jane Van-Poperin, the Principal of McKinley Elementary School; Dr. Kent Gage, the School District's Director of Elementary Education; Ms. Carole Samples, the School District's former Assistant Superintendent of Instruction; and, Dr. Joseph Merinelli, the School District's Superintendent. For economy, Respondents will be referred to collectively as the School District.

Petitioners and the School District stipulated that the material facts are undisputed (Respondents' Appendix,

A-9; B-5). Kelly was a second grade student in Ms. Sandra Solomon's class at McKinley Elementary School during the 1990-91 school year. In December 1990, Ms. Solomon initiated a program called "VIP of the Week." The VIP program had been submitted to and approved by McKinley Principal Ms. Jane VanPoperin and was part of the School District's curriculum for elementary students (Respondents' Appendix, I-2, 3). The VIP program involved selecting a student to be "VIP of the Week." The VIP wore a badge and brought in "special belongings" to describe to his or her classmates. The program's purpose was to enhance students' self-confidence by giving them attention and an opportunity to make brief verbal presentations to the class about things that were important to them (Respondents' Appendix, F-2; H-2–H-3; I-2).

The VIP program proceeded without incident until the week of December 10, 1990, when it was Kelly's turn to be the VIP. Kelly chose to share with her classmates a videotape of her singing a song to the congregation of Temple Baptist Church during a worship service. The title of the song was "I came to love you early" and its lyrics stressed the importance of young children accepting Jesus Christ as their personal savior. The song's lyrics, which the District Court found were "proselytizing," were as follows:

> (Verse One)
>
> I felt sometimes I didn't have a story I could share. I wasn't rescued from a past destroyed by dark despair. Oh but, Jesus, I have memories of the times that we've been through and I wouldn't trade one moment of growing up with you.
>
> (Refrain)
>
> I came to love you early; came to know you young. You touched my heart, dear Jesus,

when my life had just begun. I gave you my tomorrows and a childish heart of sin. And you saved me from a lifetime of what I might have been.

(Verse Two)

You filled some days with laughter; you held me when I cried. You said 'child you can do anything;' you helped me when I tried. Now I treasure every memory, and I am sure there couldn't be a child who could have known more love than you gave to me.

(Verse Three)

I remember how you touched me but I can't explain it all. How a choice that is so important can be made by one so small. I just put aside my questions; what you said to do, I've done. And I thank you for the blessing of coming to you young.

Kelly testified that she wanted to share the videotape with her classmates because it was the first time she sang in front of the entire Temple Baptist Congregation during a worship service and because the song's message might help "save" her second grade classmates:

Q: [By Mr. Lusk]: Kelly, did you want to share the message of the song, what it means to you, with your classmates?

A: Yes.

Q: Why did you think that was important?

A: Because I might have a chance to help people get saved.

Q: Now, Kelly, I think I know what you mean when you say 'get saved,' but there might be people who read this transcript who don't. So

I'm going to ask you to explain for me what your understanding of that is.

A: Do you mean like, what do you mean by being saved?

Q: . . . What does that mean to you when you use those words?

A: That Jesus comes into your heart and makes it white as snow.

Q: Is it your understanding that unless people are saved they can't go to Heaven?

A: Right.

(Respondents' Appendix, G-3).

Kelly brought the videotape to school on December 13, 1990, and gave it to Ms. Solomon who previewed it (Respondents' Appendix, F-2, ¶¶7-8). Ms. Solomon, after previewing the tape, decided it was not appropriate for her classroom for several reasons. First, the tape had not been approved for showing to her class as required by School District policy (Respondents' Appendix, F-2, ¶12A). Second. she felt that showing a videotape would be inconsistent with the purpose of the VIP program. The program was designed to help develop students' self-confidence by giving them an opportunity to make brief verbal presentations about subjects that were important to them. Slipping a videotape into a VCR would not accomplish that objective because it would not involve speaking before the class (*Id.*, ¶12B). Third, Ms. Solomon was concerned that other students might ask to show videotapes if Kelly were permitted to do so. This would be a time-consuming process — involving previewing the tapes, having them approved by the School District and arranging for videotape equipment to be brought into the classroom — that she wished to

avoid because it cut into instructional time for other subjects (*Id.*, ¶12B). Ms. Solomon was also concerned about the videotape's message. The song's message was the desirability of young children accepting Jesus Christ as their personal savior. The message was entirely consistent with Ms. Solomon's religious beliefs (*Id.*). But, at the same time, she felt it was not appropriate for second graders in a public school classroom. Her students, she felt, would assume that she, as their teacher and a School District representative, endorsed the proselytizing message of Kelly's song (Respondents' Appendix, F-3, ¶12D). Ms. Solomon was also concerned that the song's message might embarrass or offend those of her students who were not Christians, or did not share Kelly's religious beliefs, and distract them from their school work (*Id.*, ¶12E).

Ms. Solomon discussed her concerns about the videotape with McKinley Elementary School Principal, Ms. VanPoperin. Ms. VanPoperin felt that Ms. Solomon's decision not to show the videotape was correct and did not override it (*Id.*, ¶13). Ms. Solomon then pulled Kelly aside and told her that she would not be able to show the videotape to the class (*Id.*, ¶14).

Ms. DeNooyer, advised of Ms. Solomon's decision, undertook to persuade the School District to reverse it. Ms. DeNooyer first met with Ms. VanPoperin. Ms. Van Poperin stood by Ms. Solomon's decision. Ms. DeNooyer then appealed to the School District's Director of Elementary Education and Assistant Superintendent for Instruction, Dr. Gage and Ms. Samples, respectively. They both concurred in Ms. Solomon's decision (Respondents' Appendix, K-1–K-4; L-1–L-2). Their written responses to Ms. DeNooyer reveal their unsuccessful attempts to reach a compromise that would not involve compelling other second grade students to watch a videotape

intended, as Kelly testified, to "save" them. Ms. DeNooyer did not discuss the videotape with the School District's Superintendent, Dr. Merinelli (Respondents' Appendix, J-2), or with any member of the School District's Board of Education (Respondents' Appendix. J-2).

The predictable effect of compelling Kelly's classmates to view the videotape was described in the uncontested Affidavit of Dr. Thomas Berndt. Dr. Berndt is a professor of child psychology at Purdue University (Respondents' Appendix, E-1, ¶¶1-4). Dr. Berndt reviewed Plaintiffs' Complaint, Defendants' Answer and Affirmative Defenses, Kelly's videotape, and the deposition testimony of Kelly and Ms. DeNooyer (*Id.*). It was Dr. Berndt's opinion that, if Kelly's classmates had been required to watch the videotape, they would have concluded that the song's message — the desirability of young children accepting Jesus Christ as their personal savior at an early age — was supported and endorsed by Kelly's teacher, Ms. Solomon, and by the School District (Respondents' Appendix, E-2, ¶8). This conclusion flows from the social cues inherent in this situation. For example, Ms. Solomon would have been present when the videotape was shown, she would have given Kelly permission to show the tape, she would have been involved in playing it, and the tape would have been shown in school during instructional time (Respondents' Appendix, E-3, ¶¶14A-D). Any positive comment Ms. Solomon might have made regarding Kelly's performance, regardless of whether it concerned the song's message, or any comment Kelly might have made about the song would have reinforced their perception that Ms. Solomon and the School District supported and endorsed the song's message (*Id.*, ¶¶14E-F). It was also Dr. Berndt's opinion that showing Kelly's videotape would have disrupted Ms. Solomon's classroom. Second grade students are unable to comprehend that people

may have religious beliefs that differ from their own and are unable to tolerate such differences (Respondents' Appendix, E-4, ¶16). When confronted with differing religious views, they invariably conclude that those holding such views are either dumb or bad (*Id.*, ¶17).

These undisputed facts were presented to the District Court through the parties' cross-motions for summary judgment. The Court first addressed the DeNooyers' First Amendment free expression claim. The Court held that Ms. Solomon's second grade classroom was a "closed forum" in which the School District retained its right to limit student expression for any legitimate educational reason. *DeNooyer by DeNooyer* v. *Livonia Public Schools, et* al., 799 F. Supp. 744, 749 (E.D. Mich. 1992). The Court went on to hold that the School District had several legitimate reasons for not permitting Kelly to show the proselytizing videotape, *Id.*, at 751, and, therefore, the School District had not violated Kelly's right to free expression. *Id.*, at 752.

The District Court also considered the "use versus access" argument that Petitioners raise here. The Court concluded that the argument was "without merit" because it was inconsistent with precedents established by this Court. *Id.*, at 752. The District Court did not address the "viewpoint discrimination" argument Petitioners raise here because that argument was not raised to the District Court.

The District Court did address the equal protection argument to which Petitioners make passing reference. The Court, noting that it had already determined that the School District had not violated the First Amendment, held that no fundamental right was at issue and that Petitioners were not members of any suspect class. *Id.*, at 754. Therefore, the issue of whether the School District's decision not to permit Kelly to show the

videotape while permitting another student to talk about a menorah violated the Equal Protection Clause turned on whether the School District had a rational basis for making such a distinction. *Id.* The Court observed that a rational basis existed between student expression perceived to have the effect of proselytizing elementary students during instructional time as opposed to student expression "about religion" that did not proselytize. The former, noted the Court, raised legitimate concerns about offending other students and their parents and about violating the Establishment Clause not raised by the latter. The District Court also ruled against the Petitioners on their free exercise, free association and liberty interest claims not raised in the Petition. *Id.*, 753-755. Thus, the District Court denied Petitioners' motion for summary judgement, granted the School District's motion and entered Judgment in the School District's favor.

Petitioners filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals' November 18, 1993 Opinion, which remains unpublished, noted the parties' agreement that there were no outstanding issues of material fact. The Court reviewed the undisputed reasons Ms. Solomon had articulated for deciding not to compel the class to watch Kelly's videotape and determined that each articulated reason was "strongly related to a legitimate pedagogical concern." The Court then applied the rule established by this Court's opinion in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988), and affirmed the District Court's Judgment. The Court rejected the remainder of Petitioners' arguments on the basis of the District Court's opinion.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS HAVE NOT IDENTIFIED ANY LEGITIMATE BASIS FOR THIS COURT TO EXERCISE ITS DISCRETION TO GRANT THEIR PETITION.

Petitioners have not identified any legitimate reason why this Court should grant their Petition. Petitioners have not specified any important question of law that has not been clearly addressed by this Court's prior opinions. Petitioners have not identified any conflict among the Circuits regarding the issues involved in this case. Nor have Petitioners convincingly demonstrated that the opinion of the District Court or the unpublished opinion of the Court of Appeals is inconsistent with any opinion of this Court.

II.

THE LOWER COURTS CORRECTLY HELD THAT RESPONDENTS HAD NOT VIOLATED PETITIONERS' FIRST AMENDMENT RIGHT TO FREE EXPRESSION BY PROHIBITING THEM FROM COMPELLING SECOND GRADE STUDENTS TO WATCH A PROSELYTIZING VIDEOTAPE IN A PUBLIC SCHOOL CLASSROOM DURING INSTRUCTIONAL TIME.

This Court has traditionally and consistently analyzed governmental action restricting expression according to the forum in which the expression occurred. Three kinds of forums have been recognized: the open forum — such as a public street or public park that has been, by long tradition or governmental fiat, devoted to assembly and debate — in which the government may not regulate expression unless the regulation is necessary to serve a compelling governmental interest; the limited open forum — a place the government has opened to the general public for expressive purposes —

in which, like the open forum, the government may not regulate expression unless the regulation is necessary to serve a compelling governmental interest; and, the closed forum — such as a public school classroom — in which the government retains full authority to regulate expression on any reasonable basis. *Perry Education Association* v. *Perry Local Educators Association*, 460 U.S. 37, 45-46, 103 S. Ct. 948, 954-955, 74 L. Ed. 2d 794 (1983); *Hazelwood School District* v. *Kuhlmeier, supra,* 484 U.S. at 267, 108 S. Ct. at 568; *United States* v. *Kokinda*, 497 U.S. 720, 726-727, 110 S. Ct. 3115, 3119-3120, 111 L. Ed. 2d 571 (1990).

This Court's decision in *Hazelwood, supra,* is directly on point. *Hazelwood* concerned a free expression claim in the public school context in which this Court held that a public school is a closed forum in which student expression may be restricted for any legitimate pedagogical (educational) reason. *Hazelwood* involved a high school principal's decision to censor two articles from a student newspaper that had been written by journalism students. The articles described three high school students' experiences with pregnancy and the impact of divorce on students at the school. The principal, concerned that the pregnant students' identities might be revealed and that the articles' references to sexuality and birth control were simply inappropriate for some of the school's younger students, ordered the articles deleted from the paper. *Id.*, 484 U.S. at 263-264, 108 S. Ct. 565-566. Plaintiffs. the students who had written the articles, sued alleging that the school district and the principal had violated their First Amendment right to free expression.

This Court addressed and rejected plaintiffs' contention that the school newspaper was a forum for public expression. This Court held that it was not and,

further, that a public school was a closed forum unless it had been opened for "indiscriminate use by the general public":

> We deal first with the question whether [the school newspaper] may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions' [citations omitted]. Hence, school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' [citations omitted] or by some segment of the public such as student organizations [citations omitted]. If the facilities have instead been reserved for other intended purposes, 'communicative or otherwise,' then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community [citations omitted]. 'The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.'
>
> *Id.*, 484 U.S. at 267, 108 S. Ct. at 568 [citations omitted].

This Court then stated that, in the closed forum of a public school classroom, teachers and school district administrators may restrict student expression for any legitimate educational reason:

> Educators are entitled to exercise . . . control over . . . student expression to assure that the participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speakers are not erroneously attributed to the school.
>
> * * *
>
> In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexuality in a high school setting.
>
> * * *
>
> This standard is consistent with our oft expressed view that the education of the nation's youth is primarily the responsibility of parents, teachers, and state and local officials, and not of federal judges [citations omitted]. It is only when the decision to censor a school sponsored publication, theatrical production or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicate[d] [citation omitted], as to require judicial intervention to protect students' constitutional rights.
>
> *Id.*, 484 U.S. at 271-278, 108 S. Ct. at 570-571 [footnote omitted].

Respondents submit that the *Hazelwood* opinion made several clear points important to the proper resolution of this case. First, a public school classroom is

not an open public forum or even a limited public forum regardless of whether students are permitted some latitude about the subjects they may discuss in class. Rather, a public school classroom is a closed forum in which teachers and administrators may restrict student expression so long as the restriction is rationally related to a legitimate educational concern. Second, the age and maturity of the students in the classroom is an important factor that the school district, and the courts, should consider when evaluating the legitimacy of the public school's educational concern. Third, federal courts should be extremely hesitant to interfere with the judgment of local school districts and their administrators, given that education is entrusted to elected state and local officials and not to appointed federal judges.[1]

This Court and the lower courts have indicated that the concept of legitimate educational reasons for restricting student expression is quite open-ended. In *Hazelwood,* this Court observed that making sure the expression is consistent with the objective of the lesson is a legitimate basis for restricting student expression. *Id.*, 484 U.S. at 271, 108 S. Ct. at 570. Speech that might disrupt the classroom or interfere with the rights of other students may also be prohibited, *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 508, 89 S. Ct. 733, 737, 21 L. Ed. 2d 731 (1969), as well as speech that is inappropriate for the students to whom it is addressed due to their level of maturity. *Hazelwood*,

---

[1] **The Circuit Courts of Appeals and District Courts have consistently applied *Hazelwood* since it was announced and there are no conflicts among the reported decisions. *See, e.g.*, *Bishop* v. *Aronov*, 926 F.2d 1066 (11th Cir. 1991), *cert. denied sub nom.*, *Bishop* v. *Delchamps*, ___ U.S. ___ (1992); *Miles* v. *Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991); *Poling* v. *Murphy*, 872 F.2d 757 (6th Cir. 1989); *Hemry by Hemry* v. *School Board of Colorado Springs*, 760 F. Supp. 856 (D. Colo. 1991).**

supra, 484 U.S. at 271, 108 S. Ct. at 570; *Bethel School District* v. *Fraser*, 478 U.S. 675, 684, 106 S. Ct. 3159, 3165, 92 L. Ed. 2d 549 (1986). Additionally, the Courts of Appeals have made clear what is implicit in *Hazelwood* — that a public school district's concern that student expression might be controversial provides a legitimate basis for restriction. *See, e.g., Planned Parenthood* v. *Clark County School District*, 887 F.2d 935, 945-946 (9th Cir. 1989), *aff'd. en banc*, 941 F.2d 817 (9th Cir. 1991), holding that a school district's concern that plaintiff's advertisement in a school publication promoting birth control might be controversial justified removing the advertisement. Likewise, a school district's concern about violating the Establishment Clause has been held a rational basis for restricting the in-school expression of students' religious views. *Lundberg* v. *West Monona Community School District*, 731 F. Supp. 331, 339 (N.D. Iowa 1989); *Doe* v. *Human*, 725 F. Supp. 1503 (W.D. Ark. 1989), *aff'd.*, 923 F.2d 857 (8th Cir. 1990).

The facts of this case, which Petitioners conceded were undisputed, established clear and compelling educational concerns justifying Ms. Solomon's decision not to require her entire second grade class to watch Kelly's videotape. First, the videotape had not been preapproved, as required by School District policy (Respondents' Appendix, F-3). Second, Ms. Solomon did not think that showing the videotape would accomplish the lesson's objective. The point of the VIP presentations was to enhance students' self-confidence through verbal presentations to classmates. This objective would not be realized if the students simply had the teacher show a videotape to the class (*Id.*; Respondents' Appendix, H-3). Third, Ms. Solomon was concerned about the logistics of showing student videotapes. She would have to preview them, have them approved pursuant to School District policy and arrange to have

viewing equipment in the classroom. This would diminish the amount of instructional time left for other subjects (*Id.*). Fourth, Ms. Solomon was concerned with the effect the videotape would have on her other students. They might assume that she or the School District endorsed or supported the proselytizing message of Kelly's song (Respondents' Appendix, F-3).[2] If so, they could be embarrassed or disturbed by the videotape and it would interfere with their schoolwork, particularly if they did not share Kelly's views (*Id.*). Dr. Berndt's affidavit makes clear that Ms. Solomon's concern on this subject was indeed legitimate (Respondents' Appendix, E-1—E-4).

Applying these uncontested facts to the rule articulated in *Hazelwood,* the District Court held that the School District had several legitimate educational reasons for not requiring Kelly's classmates to watch her videotape:

> [T]he Livonia school authorities have legitimate pedagogical interests in deciding that Kelly DeNooyer should not show her video. The purpose of the VIP program was to teach children oral communication skills. Showing a videotape would circumvent this purpose. The school authorities wanted to avoid encouraging other children to bring in videotapes, because showing them preempts instructional time. The School had a policy of having all videotapes reviewed before classroom use. Moreover, because the show-and-tell was conducted during classroom instructional time, all students were required to attend. The school wanted to avoid a situation where other students and their parents would be

---

2 **Ms. Solomon did, in fact, share Kelly's religious beliefs.**

> offended by the religious content of the speech they were required to listen to or would infer the school's endorsement of the speech presented during class. The maturity level of the second grade students was a significant concern.
>
> *DeNooyer, supra*, 799 F. Supp. at 751.

Similarly, the Sixth Circuit, citing *Hazelwood,* held:

> When these principles are applied to the present case, it is clear that Kelly DeNooyer's proposed presentation was part of the class curriculum and was, therefore, school sponsored expression. Because the school had not opened the classroom for use as a public forum, it could regulate both the style and the content of Kelly DeNooyer's presentation, provided its regulation was reasonably related to legitimate pedagogical concerns of the schools.
>
> According to the testimony of Ms. Solomon, her primary 'pedagogical concern' the aim of the 'VIP of the Week' program, was to increase her students' verbal communication skills by requiring a 'live' classroom presentation by the student on some subject of his or her choosing. That concern would be frustrated if every student were permitted to show a videotape of himself or herself doing some activity at another location. Furthermore, the use of a videotape was of concern to Ms. Solomon because it imposed burdens on her as a teacher by forcing her to take time (1) to have the videotape approved by the school district according to its policy (2) to preview the tape herself for classroom suitability, and (3) to arrange for the neeessary replay equipment to be brought to the classroom. These pedagogical concerns apply to

> the 'style' of the presentation, that is, the medium of the videotape itself, regardless of its content. This concern as to the medium of the videotape being sufficient to affirm the district court, it is unnecessary to rule on the other reasons presented by the defendants.
>
> For the reasons stated, we hold that the district court did not err in finding the school's rejection of the showing of the videotape to be reasonably related to legitimate pedagogical concerns, and we AFFIRM the district court's grant of summary judgment as to this issue. As to the other issues raised in this appeal, we AFFIRM the district court's grant of summary judgment for the reasons stated in its memorandum opinion . . . .
>
> (Respondents' Appendix, D-6–D-7).

The reasons stated by the District Court for dismissing Petitioners' First Amendment claim and the reasons articulated by the Sixth Circuit for affirming the District Court are absolutely consistent with the rule and rationale of this Court's decision in *Hazelwood*. Accordingly, this Court should not exercise its discretion to grant the Petition.

III.

THE REASONS PETITIONERS HAVE ADVANCED IN FAVOR OF GRANTING THE PETITION ARE NOT SUPPORTED BY THE DECISIONS OF THIS COURT, OR ANY OTHER, AND ARE INCONSISTENT WITH THIS COURT'S WELL-ESTABLISHED FIRST AMENDMENT JURISPRUDENCE.

Respondents understand Petitioners to assert four reasons for granting their Petition: (1) because the lower courts failed to recognize that forum analysis does not apply to an "insider" seeking to "use" school district

facilities as opposed to an "outsider" seeking "access" to school district facilities; (2) because the lower courts failed to recognize that Ms. Solomon transformed her classroom from a closed forum into a limited open forum by establishing the VIP program; (3) because the lower courts failed to recognize that viewpoint discrimination is unconstitutional even in a closed forum; and, (4) because the lower courts permitted the school district to treat religion differently than other subjects. Respondents will address these reasons in the order presented by Petitioners.

A. Petitioners' Argument That Forum Analysis Does Not Apply To "Use" As Opposed To "Access" Cases Is Inconsistent With The Court's *Hazelwood* Decision And Does Not Provide A Meaningful Basis For Distinguishing Between "Use" And "Access" Cases.

Petitioners maintain that forum analysis, the method this Court applied in cases like *Perry*, *supra*, *Hazelwood*, *supra*, and *Kokinda*, *supra*, does not apply in cases where an "insider" is seeking to "use" school district facilities. Rather, in "use" cases school district authorities may not restrict student expression unless it materially and substantially interferes with the activities or discipline of the school (Petition, p. 6). Forum analysis, contend Petitioners, only applies to cases in which "outsiders" are seeking "access" to school district facilities. This argument is apparently constructed from a passing comment in *Airport Commissioners* v. *Jews for Jesus, Inc.*, 482 U.S. 569, 573, 107 S. Ct. 2568, 2571, 96 L. Ed. 2d 500 (1987),[3] about an issue this Court did not resolve which, in turn, was based on a law review article.

---

[3] **Respondents note that Petitioners miscite *Jews for Jesus, supra*, as having been decided in 1990 rather than 1987.**

The dual standards Petitioners would have this Court adopt for persons in public school classrooms, depending on whether they are "insiders" or "outsiders," is not consistent with this Court's decision in *Hazelwood*. The plaintiffs in *Hazelwood* were students in a journalism class who were prohibited by their principal from publishing articles in the school newspa er. Certainly, the *Hazelwood* plaintiffs, like Kelly in this case, were "insiders." Yet, this Court employed forum analysis to reject their First Amendment claim. *Hazelwood* was decided after *Jews for Jesus*. Therefore, there can be no question except that *Jews for Jesus* did not establish a distinction between "use" and "access" cases. *See*, *DeNooyer*, *supra*, 799 F. Supp. at 752.

Petitioners also fail to articulate a meaningful distinction between "insiders" and "outsiders" in the context of an elementary school classroom. The School District believes it has the authority to preclude any "outsider" from intruding into Ms. Solomon's second grade classroom. Thus, the logical result of the distinction Petitioners would have this Court draw between "use" and "access" would eliminate forum analysis in school district cases.

The School District submits that Petitioners have not carefully considered the practical effect of eliminating forum analysis in elementary school classrooms. Elementary teachers do many things besides impart information to their students. They attempt to socialize and encourage them with subtle and, occasionally, not so subtle reminders and reprimands about their behavior, including their expressive behavior. These important tasks would be infinitely more complex, and perhaps not achievable, if elementary teachers were subject to liability for violating the First Amendment every time they restricted their students' immature desires to

express themselves in the absence of "material and substantial interference with the activities or discipline of the school." The School District submits that this result is not required by the First Amendment.

B. Petitioners' Argument That Ms. Solomon Transformed Her Second Grade Classroom From A Closed Forum Into A Limited Open Forum By Initiating The VIP Program Is Not Consistent With *Hazelwood* And Not Supported By Any Opinion Of This Court Or Any Other Court.

In *Hazelwood*, this Court clearly held that public school classrooms were closed forums in which school district administrators and teachers may restrict student expression for any legitimate educational reason. This Court further stated that public school classrooms retained their character as closed forums even if students are permitted to express themselves in class, unless school authorities have "by policy or by practice" opened them for "indiscriminate use by the general public":

> . . . [S]chool facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' . . . if the facilities have instead been reserved for other intended purposes, 'communicative or otherwise' then no public forum has been created and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community . . .
>
> *Id.*, 484 U.S. at 267, 108 S. Ct. at 568.

Thus, the mere fact that Ms. Solomon initiated a curriculum related communicative activity in her classroom (i.e., the VIP program) did not transform her classroom from a closed forum into a limited open forum.

The cases string cited by Petitioners do not suggest a different result. Most were decided before *Hazelwood.* Additionally, all of the cases cited by Petitioners are distinguishable because they involved (1) middle or high school aged students (2) engaged in expressive activities that were *not* curriculum related (3) outside of the classroom and, in some cases, off school premises. These are constitutionally significant distinctions, as explicitly recognized by the Courts that authored those opinions. Thus, Petitioners have not identified a single case supporting their position that involved curriculum related speech in a public elementary school classroom.

Petitioners proceed from their flawed premise to the conclusion that, having created a limited open forum, Ms. Solomon was prohibited from restricting student speech based on its content unless the restriction was narrowly drawn to effectuate a compelling governmental interest (Petition, p. 9). Surely, this assertion is not correct. Do Petitioners mean to argue that Ms. Solomon would have been without authority to prohibit one of her students from compelling the rest of the class, during instructional time, to watch a videotape that included nudity, graphic violence, profanity, or acts of wanton cruelty? Conversely, do Petitioners maintain that the government has a "compelling interest" in prohibiting such expression? The School District will not attempt to gage Petitioners' response to these questions. However, it does appear that Petitioners have not carefully considered the ramifications of the rule they would have this Court adopt.

C. Petitioners' Argument That The School District Engaged In Unconstitutional Viewpoint Discrimination Was Not Raised Below And Is Contradicted By The Undisputed Facts Of This Case.

It is well-settled that this Court will not ordinarily consider grounds for reversal that were not raised below. *Taylor* v. *Freckind and Kronz*, ___ U.S. ___, 112 S. Ct. 1644, 1649, 118 L. Ed. 2d 280 (1992). Petitioners did not raise their viewpoint discrimination argument below and, therefore, it should not be considered here.

Beyond the fact that Petitioners did not raise their viewpoint discrimination argument below, the undisputed record establishes that Ms. Solomon did not decide not to compel her entire class to watch Kelly's videotape because she disagreed with the viewpoint expressed in the tape. To the contrary, Ms. Solomon shared Kelly's religious views (Respondents' Appendix, F-2). The undisputed reasons that Ms. Solomon decided not to show the videotape have already been discussed at length. They included her well-founded concern that her young students might misunderstand her, as their teacher and a School District official, to endorse the proselytizing message of Kelly's song and, to that limited extent, were influenced by the videotape's content. However, there is no basis in this record for Petitioners to argue that the videotape was not shown because any person at the School District disagreed with its message.

Related to Petitioners' new found viewpoint discrimination argument are repeated references to the fact that another student was permitted to bring a menorah into the classroom. These references are sprinkled throughout the Petition and tied to the suggestion that the School District favored Judaism at the expense of Christianity or was, in some fashion, hostile to Chris-

tianity. These innuendos are offensive, unfair and not supported by the record.

The School District is located in an overwhelmingly Christian community. Ms. Solomon and all of the named Respondents are Christians. In fact, most students enrolled in the School District do not have the opportunity to meet a Jewish person or learn anything about the Jewish religion. In this context, Amber Cole, perhaps the only Jewish student at McKinley Elementary School, showed her class a menorah as part of a report on the State of Israel (Respondents' Appendix, H-2). Kelly testified that Amber said the following about the menorah: "Well, she said that every day like before Christmas she blew out one of the candles" (Respondents' Appendix, G-2). Thus, Amber, unlike Kelly, did not attempt to proselytize during instructional time with Ms. Solomon's active assistance. Moreover. Ms. Solomon was acting well within her authority by permitting Amber to provide the class with information about an unfamiliar religion as part of a report about a foreign country. Petitioners' contention that this is evidence of anti-Christian bias constitutes unfair and overzealous advocacy.

D. Petitioners' Argument That The School District Must Treat Religion As Any Other Subject Unless Distinctions Are Based On Compelling Governmental Interests Is Inconsistent With This Court's Establishment Clause Jurisprudence.

The Establishment Clause requires the government to be and to appear absolutely neutral with respect to religion. This Court has applied the Establishment Clause with rigorous strictness in public schools due to the immaturity and impressionability of school aged children. *See, e.g., Illinois ex. rel. McCollum* v. *Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948)

(school district policy providing that parents could consent to release students for 30-45 minute weekly period of religious instruction by visiting clergy violates the Establishment Clause); *Engel* v. *Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L, Ed. 2d 601 (1962) (school district policy requiring teachers to begin each day with a non-denominational invocation violates Establishment Clause); *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (school district policy requiring readings from Bible or invocations of Lord's Prayer at beginning of day violates Establishment Clause); *Epperson* v. *Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (law prohibiting teaching of theory of evolution violates Establishment Clause); *Stone* v. *Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1981) (law requiring posting of Ten Commandments in classroom violates Establishment Clause); *Wallace* v. *Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (moment of silence law violates Establishment Clause); *Edwards* v. *Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (law requiring teaching of "creation science" if evolution is taught violates Establishment Clause). This Court has even held that the mere *possibility* that a student might misinterpret religious symbolism as a public school's endorsement of a particular religion violates the Establishment Clause. *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373, 397, 105 S. Ct. 3216, 3230, 87 L. Ed. 2d 267 (1985).

Recently, in *Lee* v. *Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992), this Court again reinforced the necessity of heightened Establishment Clause scrutiny in the public school context. In deciding that an invocation and benediction performed at a "voluntary" graduation ceremony violated the Establishment Clause, this Court noted:

> As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressures in the elementary and secondary public schools. Our decisions . . . recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. This coercion may not be limited to the context of public schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that a nonbeliever respect their religious practices, in a school context may appear to the nonbeliever to be an attempt to employ the machinery of the state to enforce religious orthodoxy.
>
> *Id.*, ___ U.S. at ___, 112 S. Ct. at 2652.

Petitioners maintain, in the face of these precedents, that the Constitution prohibits public school districts from treating religious speech in the classroom differently from speech on other subjects in the absence of compelling governmental interests. This position would effectively read the Establishment Clause out of the First Amendment and, not surprisingly, Petitioners do not offer any authority on point. To the contrary, the Establishment Clause, as long interpreted by this Court, requires public school districts to treat religion differently than other subjects. Teachers and other school district authorities may, for pedagogical reasons or from sincere conviction, appear to endorse any manner of ideas or ideologies. They may not, however, appear to endorse one religion over another or religion in general. This is the clear and consistent command of this Court. The School District does not need a "compelling governmental interest" to observe the Establishment Clause.

In addition, this record does not support Petitioners' notion that the School District treated religion differently than other subjects. The vast majority of Ms. Solomon's reasons not to show Kelly's videotape had nothing to do with its message, but had to do with the fact that showing a videotape was not consistent with the purpose of the lesson and due to the logistics of showing videotapes in general. The Sixth Circuit held that these factors alone justified Ms. Solomon's decision, irrespective of the videotape's content (Respondents' Appendix, D-6). Thus, the record does not support Petitioners' focus on the religious message in Kelly's videotape.

CONCLUSION

Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

KELLER, THOMA, SCHWARZE,
SCHWARZE, DuBAY & KATZ, P.C.

By: /s/ ROBERT A. LUSK
Counsel of Record
CHRISTOPHER M. MURRAY
Attorneys for Respondents
440 East Congress, 5th Floor
Detroit, Michigan 48226
(313) 965-7610

DATED: March 23, 1994